BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

Fraternal Order of Police (FOP), Lodge No. 37 Petitioner,	)	
v.	)	OAH No. 14DL0172 PD
	)	Case No. 75-CAE-8-2013
The University of Kansas Medical Center (KUMC) Respondent.	)	

ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD SETTING ASIDE THE HEARING OFFICER'S INITIAL ORDER DISMISSING PETITIONER'S CONSOLIDATED PROHIBITED PRACTICE COMPLAINTS AND GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW on this 7th day of November, 2019, Fraternal Order of Police Lodge No. 37's Petition for Review of the Initial Order of the Hearing Officer dismissing Petitioner's Complaint comes on for consideration by the Kansas Public Employee Relations Board (hereinafter "PERB"). Fraternal Order of Police Lodge No. 37, ("Petitioner", "Employee Organization" or "FOP Lodge No. 37"), appears by legal counsel, Matthew R. Huntsman, Attorney at Law, BUKATY AUBRY & HUNTSMAN, CHARTERED. Employer University of Kansas Medical Center, ("Respondent", "Employer" or "KUMC"), appears by Eric J. Aufdengarten, Associate General Counsel and Special Assistant Attorney General, University of Kansas Office of the General Counsel.

BACKGROUND

On June 24, 2013, Petitioner filed a Prohibited Practice Complaint pursuant to K.S.A. 75-4333(b) of the Kansas Public Employer-Employee Relations Act, ("the Act" or "PEERA"), before the PERB alleging refusal by Respondent to produce documents necessary for the representation

of one of Petitioner's members in a grievance. On July 3, 2013, Respondent filed its Answer and Motion to Dismiss asserting that Petitioner's complaint failed to state a claim for which relief could be granted and requested dismissal, arguing that the parties' Memorandum of Agreement, ("MOA"), excluded performance evaluations from the MOA Article 40 grievance procedure.

Following an August, 2013 internal reorganization within the Department of Labor which resulted in reassignment of the Public Employee Relations Board's hearing officer to the Division of Workers Compensation, this case was forwarded to the Office of Administrative Hearings, ("OAH"), which assigned a new presiding officer.

A second Complaint was filed by Petitioner on September 6, 2013, based again on Respondent's refusal to provide documents to Petitioner for the representation of the member in a grievance. On May 2, 2014, Respondent filed a Motion to Dismiss before OAH hearing officer Bob L. Corkins. On June 18, 2014, Petitioner filed its own Motion for Summary Judgment.

On August 15, 2014, hearing officer Corkins issued an Initial Order granting Respondent's Motion to Dismiss, ruling that Petitioner's consolidated complaints failed to state claims upon which relief could be granted. The Initial Order stated an additional basis for its conclusion, dismissing the matter "because petitioner effectively calls for the interpretation of the parties' MOA, a function beyond PERB's jurisdiction". On August 29, 2014, Petitioner filed a Petition for Review of Initial Order with this Board. On October 30, 2015, the Board issued an Order Granting Review and requested additional briefing from the parties on the merits of the case.

Thereafter, this matter was successively assigned to no fewer than five different attorneys within the Department of Labor to review the case and to advise the Board. Each in turn left the Department's employment or was otherwise reassigned from the matter. During roughly this same time frame, the terms of office of several members of the Board expired, two members resigned

and no new Board members were appointed by the Governor to take their places. In 2018, Department of Labor staff attorney Douglas A. Hager was assigned to this matter and he set and received oral argument on March 20, 2018. Earlier this year, Mr. Hager requested that the parties submit supplemental written argument on the issues addressed at oral argument, delineated below.

This matter is now fully submitted and the Board, fully constituted, its five members having been only recently appointed and confirmed pursuant to state law during the current administration, issues this Order addressing all questions of fact and law necessary to its resolution.

FINDINGS OF FACT

1. Petitioner, FOP Lodge No. 37, is an "employee organization" as defined by the Kansas PEERA which has as one of its primary purposes representing employees of a public agency in dealings with that public agency over conditions of employment and grievances. K.S.A. 75-4322(i). *See also*, K.S.A. 75-4321(b)(noting that "it is the purpose of this Act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of the law.")

2. Petitioner is the recognized employee organization, as defined at K.S.A. 75-4322(j), representing a bargaining unit of police personnel employed by Respondent. Respondent's Answer and Motion to Dismiss and/or Deny Prohibited Practice Complaint, 75-CAE-8-2013, filed July 3, 2013, p. 2. *See also*, Agency Record, ("AR"), Vol. 1, Doc. 2, Exh. 1, p. 1 (Parties' MOA stipulates that Employer recognizes Petitioner as the exclusive representative of unit employees for purposes of meeting and conferring and the settlement of grievances).

3. Respondent KUMC is a "public agency" or "public employer" as defined at K.S.A. 75-4322(f) by the Act and it comes under the provisions of PEERA pursuant to K.S.A. 75-4321(b) and K.S.A. 75-4322(f).

4. Corporal James Gregg began his career with KUMC's Police Department in December, 1995. Petitioner's Brief Pursuant to Presiding Officer's Order, filed March 15, 2019, p. 4.

5. On November 8, 2012, Corporal James Gregg, a member of the police officer bargaining unit represented by Petitioner FOP Lodge No. 37, Respondent's Answer and Motion to Dismiss and/or Deny Prohibited Practice Complaint, filed July 3, 2013, p. 2, was given an unsatisfactory rating on his annual performance evaluation by Respondent. Supplemental Brief of Respondent Pursuant to Presiding Officer's Order, filed April 15, 2019, p. 4.

6. By letter dated December 21, 2012, Petitioner appealed Corporal Gregg's unsatisfactory evaluation to Respondent's Associate Vice Chancellor of Human Resources in accordance with Article 40 of the parties' MOA. AR, Vol. 1, Doc. 32, Exh. A, Att. 4.

7. The parties' MOA was approved June 4, 2012. AR, Vol. 1, Doc. 2, p. 6. Under the MOA's terms, a unit member may only be disciplined for proper cause. AR, Vol. 1, Doc. 32, Exh. A, Att. 2, Article 39, p. 21 ("Employees may be disciplined only for proper cause.").

8. The parties' MOA, Article 40, "Grievance Procedure", provides that "any dispute arising from an alleged breach, misinterpretation or improper application of provisions of this [MOA] shall be resolved" as provided by Article 40. AR, Vol. 1, Doc. 2, Exh. 1, Article 40, p. 25. Article 40 further provides "this grievance procedure does not apply to disciplinary action of demotion, dismissal and suspension which shall be covered by . . . Article 39", and that "this grievance procedure does not apply to performance evaluations. . . . [which] may be appealed to the Associate Vice Chancellor of Human Resources or his or her designee." *Id.* The parties' MOA provides no

further explanation of the process for grieving performance evaluations. The MOA doesn't expressly prohibit document requests. It simply doesn't address the issue. The Board does not construe this silence to waive the FOP's statutory right and nothing contained in the MOA can reasonably be construed as a waiver of the statutory right to information necessary to an employee organization's representation of a member in a grievance. *See* AR, Vol. 1, Doc. 30, Exh. 1.

9. The parties' MOA's definition of a grievance, i.e., a "dispute arising from an alleged breach, misinterpretation or improper application of provision" of the MOA, is more restrictive than the Act's definition of a grievance, i.e., "a statement of dissatisfaction by a public employee, supervisory employee, employee organization or public employer concerning interpretation of a memorandum of agreement or traditional work practice." K.S.A. 75-4322(u). The statutory definition of grievance encompasses disputes arising not only from MOAs but also those that find their genesis in work practices. *Id.*

10. In accordance with MOA Article 40, grievances of performance evaluations are directed to the Associate Vice Chancellor of Human Resources or his or her designee. In reviewing a grievance, Associate Vice Chancellor for Human Resources Adrian Fitzmaurice, in most cases, does not review the documents that form the basis of an unsatisfactory performance evaluation. AR, Vol. 1, Doc. 32, Exh. E, pp. 21-24. Rather, Fitzmaurice's general practice is to interview the supervisor who performed the evaluation. *Id.*

11. "KUMC Police Department has a traditional work practice of giving annual performance evaluations." AR, Vol. 1, Doc. 32, Exh. A, Att. 1, p. 5. During Cpl. Gregg's career with KUMC Police Department, he received annual performance reviews. AR, Vol. 1, Doc. 32, Exh. D, p. 1.

12. Under KUMC policy, employees face discipline up to and including termination upon receiving two consecutive unsatisfactory performance reviews. AR, Vol. 1, Doc. 32, Exh. D, p. 1.

13. As Corporal Gregg's Employer, Respondent was obligated by state law "to enter into discussions" with bargaining unit member Gregg's exclusive representative, Petitioner FOP Lodge No. 37, "with an affirmative willingness to resolve grievances and disputes relating to conditions of employment". *See* K.S.A. 75-4321(b).

14. On February 18, 2013, Petitioner requested documents including "the entire personnel file for Corporal Gregg," "all documents concerning discipline for employees of the KUMC Police Department who have been disciplined for the loss of University property or equipment over the past 5 years," all communications regarding the negative performance evaluation from November 8, 2012, "a copy of all policies and procedures Corporal Gregg is alleged to have violated in his performance evaluation," documents relied on by KUMC in issuing the performance evaluation, and the "entire investigatory packet for Corporal Gregg's charge of discrimination filed with Human Resources." Respondent's Supplemental Brief, April 15, 2019, p. 5. Petitioner considered these documents and information to be necessary to prepare for Cpl. Gregg's performance evaluation appeal and necessary to the performance of its statutory duty to represent unit members in grievances.[1] AR, Vol. 1, Doc. 32, Exh. A, Att. 5. Petitioner's requests for information was

[1] The duty of fair representation, inferred from a labor union's exclusive statutory authority to represent all employees in an employee bargaining unit, *see* K.S.A. 75-4328 (mandating that "public employer shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances, and also shall extend the right to unchallenged representation status, consistent with subsection (d) of K.S.A. 75-4327, during the twelve (12) months following the date of certification or formal recognition"), requires a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909-910, 17 L.Ed.2d 842 (1967). Duty of fair representation is breached if a union's actions are either " 'arbitrary, discriminatory, or in bad faith.' " *Renfro v. Interstate Brands Corp.*, 879 F.Supp. 1582, 1584 (D.Kan. 1995) (citations omitted). A union must discharge its duty both in bargaining with the employer and in its enforcement of the resulting collective-bargaining agreement. *Vaca v. Sipes*, 386 U.S. at 177. In the instant matter, Petitioner recognized its obligation and sought to pursue its bargaining unit member's grievances in a manner consistent with the principles of fair representation. While the term, "duty of fair representation", refers to a judicial construct inferred from the National Labor Relations Act, the Board is of the view that, for purposes of this determination, the Kansas PEERA implicitly imposes an essentially indistinguishable obligation on recognized employee organizations, that of fairly representing all employee members of bargaining units in dealings with public employers over terms and conditions of employment and grievances,

designed to allow Petitioner to examine the basis for Corporal Gregg's unsatisfactory evaluation, and ultimately, of his termination, and to evaluate whether the incidents underlying its member's unsatisfactory performance evaluations and termination were consistent with Respondent's treatment of other, similarly situated bargaining unit members, with the member's training, his job description, and regarding a host of other considerations. *See* AR, Vol. 1, Doc. 32, pp. 20-23. As such, it is the conclusion of the Board that the documents and information requested by Petitioner throughout this matter were relevant to its duties as the recognized employee organization.

15. In a March 27, 2013 telephone call, KUMC's counsel advised Petitioner's counsel that Respondent would provide only Cpl. Gregg's personnel file in response to Petitioner's document request. AR, Vol. 1, Doc. 32, Exh. A, p. 2.

16. On March 28, 2013, Petitioner's counsel emailed Respondent's counsel reasserting its right to and need for documents and information requested and offered to accept documents with confidential information redacted. AR, Vol. 1, Doc. 32, Exh. A, Att. 8. Petitioner also advised that "[r]efusing to provide such information constitutes a prohibited practice under PEERA." *Id.*

17. By email of April 2, 2013, KUMC again denied Petitioner's request for documents, asserting that the MOA's process for appeal of performance evaluations "does not contemplate [the] exchange of documents of any kind and no . . . discovery . . . rules apply". AR, Vol. 1, Doc. 32, Exh. A, Att. 9. KUMC offered to provide Cpl. Gregg's personnel file. *Id.*

18. By letter dated April 15, 2013, Petitioner's counsel provided Respondent a detailed explanation regarding an employer's duty to provide documentation and information needed by the employee organization in the performance of its duties, including in relation to a grievance. AR, Vol. 1, Doc. 32, Exh. A, Att. 10. Petitioner begins with an examination of the statute:

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without regard to whether they are members of the employee organization. *See* K.S.A. 75-4322(i); K.S.A. 4327(a); K.S.A. 4328; K.S.A. 75-4321(b); K.S.A. 75-5333(c)(1).

> "[K.S.A. 75-4333(b)(5)] provides that it shall be a prohibited practice for a public employer to willfully '[r]efuse to meet and confer in good faith with representatives of recognized employee organizations as required in [K.S.A. 75-4327].' The scope of the University's duty to 'meet and confer' under [K.S.A. 75-4327] extends beyond duties related to contract formation and encompasses duties concerning grievances which arise under the contract, *Fraternal Order of Police, Lodge No. 42 v. City of Edwardsville*, PERB Case No. 75-CAE-5-2005 Initial Order of the Hearing Officer)."

Id., p. 2. Petitioner then notes that it is appropriate to look to federal law interpreting the National Labor Relations Act's counterpart to PEERA's duty to meet and confer in good faith for guidance:

> "It is well settled that the duty to 'bargain in good faith' under the NLRA includes the duty to provide the Union with information that is needed by the Union for the proper performance of its duties. *National Labor Relations Board v. ACME Industrial Co.*, 385 U.S. 432, 435-436 (1967). In *ACME*, the United States Supreme Court affirmed that an employer violated its duty to bargain in good faith when it refused to provide information requested by the Union that was relevant to a potential grievance under the parties' collective bargaining agreement. *Id. See also, Salt River Valley Users' Ass'n v. NLRB*, 769 F.2d 639, 640-41 (9th Cir. 1985) (failure of either party to give the requesting party information necessary to enable it to intelligently evaluate a potential grievance may constitute an unfair labor practice).
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> . . . .
>
> Because Corporal Gregg's performance evaluation constitutes discipline under the collective bargaining agreement and the appeal of the evaluation is a grievance, the Union is entitled to the requested information and documents as contemplated by the Supreme Court."

Id., pp. 2-3. Petitioner then explains to Respondent the scope of an employer's duty to provide information:

> "In determining the scope of the employer's duty to furnish information requested by the Union in relation to a potential grievance, the Supreme Court has applied a liberal 'discovery-type' relevance standard. *ACME Industrial Co.*, 385 U.S. at 437-38. Under this standard, an employer must provide a union with the requested information if it is 'probably or potentially relevant' to the Union's execution of its duties to evaluate and process grievances. *Washington Gas Light Co. and International Union of Gas Workers*, 273 NLRB 116, 116 (1984); *Donovan Electric, Inc. and International Brotherhood of Electrical Workers, Local Union 413*, 2006 NLRB LEXIS 259 at *29-30 (2006).

> It is also well settled that the scope of the employer's duty to produce relevant information includes the duty to produce information contained in the personnel files of employees other than the grievant. *E.g., Salt River Valley Ass'n*, 769 F.2d at 642-43 n.3. The court in *Salt River Valley* explained that work records regarding employees other than a grievant are relevant in addressing grievances challenging disciplinary actions and, except as to particularly sensitive information such as psychological test results or medical information, privacy concerns are outweighed by an employer's duty to provide such information. *Id. See also*, *Washington Gas Light Co.*, 273 NLRB at 116-17 (rejecting the employer's privacy claims and finding that the employer breached the collective bargaining obligation when it refused to provide the Union with disciplinary records of employees other than the grievant).
>
> Lastly, 'in keeping with the liberal standard of relevance, this burden is not a heavy one and only required the union to demonstrate more than a mere suspicion of the matter for which the information is sought.' *Donovan Electric*, 2006 NLRB LEXIS 259 at *31 (finding the information about non-bargaining unit members relevant and finding that the employer had committed an unfair labor practice in refusing to provide the requested information); *NLRB v. International Brotherhood of Electrical Workers, Local 309*, 763 F.2d 887, 889-90 (7th Cir. 1985) (enforcing NLRB order for employer to produce documents to Union concerning non-unit employees under lenient 'discovery-type' standard).

Id., p. 3. Petitioner then renewed its request for the information and documents it sought. *Id.*

19. On April 17, 2013, Cpl. Gregg received a second consecutive unsatisfactory rating on his performance review and termination was recommended. AR, Vol. 1, Doc. 30, Exh. 2, pp. 20-63. Petitioner and Respondent agreed to postpone appeal of the second unsatisfactory review and recommendation of termination until appeal of the first evaluation was concluded. *Id.*, pp. 80-81.

20. On May 3, 2013, Cpl. Gregg, accompanied by counsel, met with Associate Vice Chancellor for Human Resources Adrian Fitzmaurice to appeal Gregg's Nov. 8, 2012 unsatisfactory review. AR, Vol. 1, Doc. 32, Exh. A, Req. No. 12. At this appeal hearing, Fitzmaurice agreed that Gregg's appeal of his first unsatisfactory evaluation should be completed before moving on to address his second performance review and proposed termination. AR, Vol. 1, Doc. 32, Exh. A, Req. No. 13.

21. On May 23, 2013, Petitioner sent a revised documents request to KUMC which sought a copy of Cpl. Gregg's job description, "KUMC Police Department investigatory files of any officer

who was accused of, investigated for, or disciplined for loss of Police Department equipment", "missing a court appearance", "placing the hospital at liability", disciplined for misplacing evidence", and/or for "inappropriate conduct with the public or other University staff" during the last 5 years. Respondent's Supplemental Brief, April 15, 2019, pp. 6-7. The request also included all documents relied upon by KUMC in executing the performance evaluation. *Id.*, at 7.

22. By letter dated June 6, 2013, Petitioner renewed its request for documents to KUMC and again explained "the unambiguous duty under the [PEERA] to provide the Union requested documents and information concerning grievances". AR, Vol. 1, Doc. 32, Att. 13. Petitioner noted that "the Union is entitled to the information because it is relevant to the issues at hand." *Id.* In further explanation and to address concerns previously raised by Respondent, Petitioner noted that:

> "Information on other officers disciplined for similar violations as Cpl. Gregg is relevant to show possible disparate treatment, which runs contrary to just cause. Additionally, there is no legal basis to argue that the Union is not entitled to the actual reports on which Cpl. Gregg's performance evaluation was based. Such information is clearly relevant, and without it, the Union cannot meet its duty of fair representation with respect to Cpl. Gregg.
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> Our office has been directed by FOP Lodge 37 to file an unfair labor practice with the Public Employee Relations Board ("PERB") if the University does not agree to provide the requested documents and information within seven days of the date of this letter. Enclosed you will find a draft of that charge, as well as our most recent document and information request of May 23, 2013.
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> To date, the only legal authority you have mentioned as a basis for the University's continued refusal is the Kansas Open Records Act ("KORA"). However, the Supreme Court of Kansas has held that a Union is not subject to the limitations of KORA when acting under the government sanctioned activities of PEERA, including when the Union requests documents and information the employer is required to produce by PEERA. *State of Kansas, Dep't. of Social and Rehabilitation Services v. PERB*, 249 Kan. 163, 170 (1991). In Cpl. Gregg's case, the requested documents and information are both relevant to Cpl. Gregg's pending appeal and necessary for the Union to meet its duty of fair representation. Because the Union's request falls under the auspices of PEERA, the Supreme Court of Kansas has already determined that KORA does not provide the University a basis for denying our request."

Id.

23. On June 13, 2013, KUMC responded, stating that it had no duty to provide any of the requested documents, and denied the request for all documents other than Cpl. Gregg's personnel file, job description and time sheets. *Id.* In relevant part, Respondent's counsel advised Petitioner's counsel as follows:

> "[Y]our repeated assertion that the general 'meet and confer' obligations under the Kansas Public Employer-Employee Relations Act (PEERA) create some right in Corporal Gregg and the Union to obtain documentation of other's personnel records in furtherance of his appeal of his unsatisfactory performance evaluation is legally unfounded and without any authority . . . .
>
> Simply put, the University's internal, administrative procedure for appeal of an unsatisfactory performance evaluation is a management process that does not create PEERA meet and confer rights or fall under the MOA's grievance procedures. Corporal Gregg has a right to appeal his unsatisfactory performance evaluation to the [Associate Vice Chancellor]. It is not a grievance or litigation process that creates any right to production of documents by the University. Accordingly, the University stands by its decision to deny your request for all of the documents other than Corporal Gregg's personnel file, his job description and time sheets, all of which are available to him as a current employee."

AR, Vol. 1, Doc. 2, Exh. 2. Respondent's letter also suggested that "the University arguably has a . . . prohibited practice claim to assert against the Union [under K.S.A. 75-4333(c)(2)]." *Id.*

24. On June 16, 2013, Petitioner agreed to pursue its grievance/appeal of Corporal Gregg's November 8, 2012 unsatisfactory evaluation under protest. AR, Vol. 1, Doc. 30, Exh. 2, p. 89.

25. Petitioner filed the prohibited practice complaint captioned as Case No. 75-CAE-8-2013 on June 24, 2013. AR, Vol. 1, Doc. 1. In its complaint, Petitioner alleged violations of PEERA, K.S.A. 75-4333 subsection (b)(1), (b)(2), (b)(3), (b)(5), and (b)(6) as follows:

> "Since February 18, 2013, and continuing to date, the above-named employer has violated its duty to bargain in good faith with FOP Lodge 37, the exclusive bargaining representative of the police officers employed by the employer, and has otherwise violated the above-quoted sections of the Act, by failing and refusing to provide to the Union information and documents which it has requested and which it needs in order to meet its duty of fair representation to the members of the

> bargaining unit with regard to a pending grievance over its appeal of an unsatisfactory performance evaluation."

PERB Complaint Against Employer, Case No. 75-CAE-8-2013, filed June 24, 2013, AR, Vol. 1, Doc. 1 at 3.

26. As relief sought, Petitioner requested an order from PERB concluding "that the employer has violated the Act as aforesaid" and to direct and require the employer to:

> "(1) remove the unsatisfactory performance evaluation of November 8, 2011;
> (2) meet its obligation to bargain in good faith with the Union;
> (3) provide to the Union all the requested documents and information;
> (4) post a notice that, in the future, it will not:
> (A) refuse to meet its duty to bargain in good faith with the Union; and
> (B) refuse to provide to the Union documents and information which the Union requests and which the Union needs in order to meet its duty of fair representation."

Id. Petitioner further requested that PERB "[prohibit] the University from holding any appeal hearing without providing to the Union its requested documents and information," and that it grant such other relief as the Board deems to be appropriate. *Id.*

27. By correspondence dated July 1, 2013, KUMC Associate Vice Chancellor of Human Resources Adrian Fitzmaurice confirmed and upheld the November 8, 2012 unsatisfactory performance review of Cpl. Gregg. AR, Vol. 1, Doc. 30, Exh. 2, p. 96. In his correspondence, Fitzmaurice also advises that he will begin consideration of Employer's April [17], 2013 unsatisfactory performance evaluation and recommendation for termination of Cpl. Gregg. *Id.*

28. Upon receipt of said correspondence, Petitioner's legal counsel by letter dated July 8, 2013 requested an appeal hearing with Associate Vice Chancellor Fitzmaurice to discuss the second evaluation prior to any final determination. *Id.* Fitzmaurice scheduled a two hour meeting in response for July 22, 2013. *Id.*, p. 98.

29. Respondent filed and served its Answer and Motion to Dismiss with PERB on July 3, 2013. *See* Answer and Motion to Dismiss and/or Deny Prohibited Practices Complaint, KUMC, filed July 3, 2013, AR, Vol. 1, Doc. 2. In its Answer, KUMC denied Petitioner's allegations, denied that it had violated any of the statutory provisions alleged by Petitioner to have been violated, and denied that Petitioner had stated a claim for which it was entitled to relief. Answer and Motion to Dismiss and/or Deny Prohibited Practices Complaint, KUMC, AR, Vol. 1, Doc. 2 at 2. Respondents Motion noted that Article 40, Section 1.E of the MOA between KUMC and FOP Lodge No. 37, acknowledges the KUMC policy that allows an employee to appeal an unsatisfactory performance evaluation to the Associate Vice Chancellor of Human Resources, and it specifically excludes such appeals from the MOA's Article 40 grievance procedure. *Id.* at 3. Respondent requested dismissal and/or for the Board to deny Petitioner's complaint. *Id.* at 7.

30. Following the receipt of KUMC's counsel's letter of July 8, 2013, Finding of Fact No. 28, above, Associate Vice Chancellor Fitzmaurice responded in an undated letter seeking to set a late July, 2013 date and time to meet with Gregg and his counsel to appeal the second recommended unsatisfactory performance review and proposed termination. AR, Vol. 1, Doc. 30, Exh. 2, p. 99.

31. On July 23, 2013, Cpl. Gregg and counsel met with Fitzmaurice. *Id.*, p. 101. By letter of July 29, 2013, Fitzmaurice advised he was upholding Gregg's proposed termination. *Id.*

32. On August 9, 2013, pursuant to MOA Article 39, Petitioner appealed Cpl. Gregg's termination to the KUMC Appeal Board and made a request for the production of additional documents and policies. Respondent's Supplemental Brief, April 15, 2019, p. 8.

33. "In response, on August 26, 2013, KUMC agreed to provide Corporal Gregg's personnel file and documents that would be used to support KUMC's termination decision." *Id.* at 9. KUMC

declined to provide any other documents that were not already publicly available. *See id.* In an August 26, 2013 email to Petitioner's attorney, KUMC's legal counsel stated that:

> "Absent a ruling from the PERB that the documents requested by Corporal Gregg and your firm are required to be provided pursuant to the Memorandum of Agreement between the Fraternal Order of Police and KUMC in the context of this internal administrative process, KUMC declines to provide any documents as part of the current KUMC Appeal Board process (regarding Corporal Gregg's termination) other than Corporal Gregg's personnel file and documents that will be used to support KUMC's termination decision."

AR, Vol. 1, Doc. 30, Exh. 2, p. 108. KUMC offered that the termination appeal could proceed with the documents offered, or the termination appeal could be postponed until the PERB prohibited practice charge was fully adjudicated. *Id.* By this point, Respondent had been given not fewer than six opportunities to consider Petitioner's requests for documents and information. *See* Findings of Fact Nos. 14, 16, 18, 21, 22 and 32. Petitioner had laid out compelling arguments in support of its position. *See* Findings of Fact Nos. 18, 22. Petitioner had offered that Respondent redact information in its responses if confidentiality were a legitimate concern. *See* Finding of Fact No. 16. Petitioner had advised Respondent that its actions constituted a prohibited practice. *See* Findings of Fact Nos. 16, 22. Petitioner had advised Respondent that it would file a prohibited practice charge if Respondent continued to deny its requests for information. *Id.* Petitioner had addressed Respondent's objections regarding the applicability of the Kansas Open Records Act. *See* Finding of Fact No. 22. It is the finding of the Board that Respondent acted willfully when it denied Petitioner the documents and information it sought, information that was clearly relevant to its role as exclusive representative of bargaining unit members. Respondent's actions were not only intentional, purposeful, deliberate and not accidental, but it could also be said that Respondent's actions were undertaken in a manner that was unreasoningly obstinate and were taken with reckless indifference for the natural consequences of its actions.

34. On September 10, 2013 Petitioner filed a second complaint before PERB, alleging violations of PEERA at K.S.A. 75-4333, subsections (b)(1), (b)(3), (b)(5), and (b)(6) as follows:

> "On April 17, 2013, the University of Kansas Medical Center (KUMC) issued Corporal James (Jim) Gregg his second consecutive unsatisfactory performance evaluation. That evaluation was appealed, pursuant to the parties' Memorandum of Agreement, to the Associate Vice Chancellor of Human Resources Adrian Fitzmaurice. After an appeal hearing on July 23, 2013, Mr. Fitzmaurice upheld the unsatisfactory evaluation.
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> On July 29, 2013, Mr. Fitzmaurice notified Corporal Gregg by letter that the Human Resources Department had denied his performance evaluation appeal and approved the KUMC Police Department's recommended termination. On August 9, 2013, the KUMC denied the FOP's request for documents and information on the basis that it was under no requirement to do so absent a ruling from PERB.
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> By refusing to provide documents and information necessary for the Union to meet its duty of fair representation to Corporal Gregg, the KUMC has violated its duty to bargain in good faith and has interfered with rights guaranteed to an employee organization under PEERA. By committing these prohibited practices, the KUMC has also committed derivative violations by discouraging membership in the employee organization and denying the Corporal Gregg his rights guaranteed to an employee under PEERA."

PERB Complaint Against Employer, filed Sept. 6, 2013, AR, Vol. 1, Doc. 9. By reference to the statutory provision defining prohibited practices as those committed "willfully", Petitioner placed Respondent on notice of that element. K.S.A. 75-4333(b). Petitioner requested the same relief as specified in the first complaint. AR, Vol. 1, Doc. 9.

35. Petitioner filed a Motion to Consolidate its two complaints on the basis that they both arose from similar factual scenarios and that they each raised similar legal questions. Petitioner's Motion to Consolidate, AR, Vol. 1, Doc. 10 at 1-2. In its Answer, KUMC denied any engagement in prohibited practices as claimed, and denied Petitioner's stated basis for complaint. Answer to Consolidated Prohibited Practices Complaint, AR, Vol. 1, Doc. 12 at 2. Respondent's Answer does not respond to the reasons for consolidation asserted in Petitioner's Motion. *Id.*, pp. 1-4.

36. The prehearing conference for the consolidated cases was conducted before hearing officer Bob L. Corkins on March 28, 2014. Notice of Prehearing Conference Rescheduled, AR, Vol. 1, Doc. 19. A second prehearing conference was set for April 11, 2014. Prehearing Order and Notice of Prehearing Conference, AR. Vol. 1, Doc. 23. A deadline for dispositive motions was set for April 30, 2014 and was subsequently extended to May 2, 2014. AR, Vol. 1, Doc. 28.

37. On May 2, 2014, Respondent filed a Motion to Dismiss and/or for Judgment on the Pleadings with supporting documentation. *See* AR, Vol. 1, Doc. 30. Respondent's Motion focused on three contentions. First, Respondent asserted that the applicable grievance procedure for appeal from an unsatisfactory evaluation contained in the parties' MOA does not provide for a discovery mechanism, and as a consequence, Respondent was under no obligation to provide the information requested by Petitioner. *Id.*, pp. 14, 16-19. Respondent's second argument for dismissal was that Petitioner's claim that KUMC failed to meet and confer in good faith must fail as a matter of law because the parties had already concluded the meet and confer process culminating in their Memorandum of Agreement. "[T]he MOA establishes that the conditions of employment were settled between the parties [and] there were no pending negotiations between the parties at the time of Corporal Gregg's [grievance appeal] regarding the unsatisfactory performance evaluation or recommendation for dismissal." *Id.*, p. 15. Respondent's third argument for dismissal was that K.S.A. 75-4333(b) requires proof of anti-union animus or specific intent to violate an employee's or employee organization's rights as essential to establish a prohibited practice. *Id.*, pp. 19-20. Thus, Respondent asserts, because Petitioner's complaints did not "allege . . . that anti-union animus was the 'substantial or motivating factor' in denying FOP's requests for documents", its complaints fail to allege that KUMC acted "willfully", therefore they fail to state a claim upon which relief can be granted and must be dismissed as a matter of law. *Id.*, p. 20.

38. Petitioner filed its Response to the Motion to Dismiss and/or for Judgment on the Pleadings on May 20, 2014. *See* AR, Vol. 1, Doc. 31. Petitioner notes that in its Motion, Respondent "alleged that it is under no obligation to 'meet and confer' because [the parties] are not currently engaged in the negotiation of a collective bargaining agreement." *Id.*, p. 6. "This argument exemplifies Respondent's misunderstanding of its duty to 'meet and confer' under [the Act]." *Id.*

39. On June 18, 2014, Petitioner filed a Motion for Summary Judgment. *See* AR, Vol. 1, Doc. 32. On July 10, 2014, Respondent filed a Response in Opposition to Petitioner's Motion for Summary Judgment. AR, Vol. 1, Doc. 37.

40. By letter dated July 18, 2014, hearing officer Corkins advised the parties of his intent to grant Respondent's Motion to Dismiss. AR, Vol. 1, Doc. 38.

41. On August 15, 2014, Corkins issued his Initial Order dismissing Petitioner's consolidated complaints on the basis that each complaint lacked allegations sufficient to put Respondent on notice that the acts of which it complained were done willfully, thus failing to state a claim upon which relief could be granted. AR, Vol. 1, Doc. 39, p. 4. Further, the hearing officer ruled that "because petitioner effectively calls for the interpretation of the parties' MOA, a function beyond PERB's jurisdiction, this case is dismissed." AR, Vol. 1, Doc. 39, p. 8.

42. The hearing officer's Initial Order concluded that the element required under K.S.A. 75-4333(b) that an action constituting an alleged prohibited practice be committed "willfully" was lacking in each of Petitioner's prohibited practice complaints. *Id.* Observing that "willfulness has been interpreted to mean '[p]roof of anti-union animus or of a specific intent to violate an employee's, employees' or the recognized employee organization's rights' ", *id.* at 4 (citing to Initial Order, *Fraternal Order of Police Lodge No. 40 v. Unified Government of Wyandotte County/Kansas City, Kansas and Wyandotte County Sheriff's Department*, 75-CAE-3-2006 and

75-CAE-10-2006, April 9, 2009, p. 64[2], the hearing officer determined that without a specific allegation of anti-union animus in Petitioner's complaints, the case must be dismissed, as without specific allegations of anti-union animus or of an intent to violate an employee's or an employee organization's rights, Petitioner failed to provide Respondent with notice adequate to satisfy due process and thus failed to state a claim for which relief could be granted. *See id.* at 2, 4, 5.

43. The hearing officer's initial order also errs in its analysis of the law applicable to Petitioner's own Motion for Summary Judgment when it summarily rejected Petitioner's argument "that respondent's admitted failure to supply requested information represents a denial of PEERA rights *per se*." AR, Vol. 1, Doc. 39, p. 5. The hearing officer's initial order takes Respondent's denial of Petitioner's express statutory right to represent bargaining unit members in grievances, and the Respondent's concomitant duty to provide the information necessary to fulfill Petitioner's duty to represent its members, rooted in K.S.A. 75-4328, and needlessly complicates it, first by mistakenly applying the balancing test[3] endorsed by the Kansas Supreme Court to determine on a

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[2] It should be noted that the hearing officer failed to correctly apply the definition of the term "willfully" that was the subject of analysis in the administrative order cited by Corkins as authority for his decision. In that matter, the Initial Order set out a lengthy examination of the meaning of the term "willfully" as used in the Public Employer-Employee Relations Act and concluded that "[i]n order to give effect to the entire Act, and to reconcile PEERA's different provisions to make them consistent, harmonious and sensible, the purpose of promoting labor harmony through meet and confer will be served by construing "willfully" to mean that the action complained of was intentional, voluntary or deliberate, as opposed to accidental or involuntary, or that it was undertaken with reckless indifference or disregard for the natural consequences thereof, or that it was done with wrongful intent." Initial Order, *Fraternal Order of Police Lodge No. 40 v. Unified Government of Wyandotte County/Kansas City, Kansas and Wyandotte County Sheriff's Department*, 75-CAE-3-2006 and 75-CAE-10-2006, April 9, 2009, p. 64. The hearing officer's order mistakenly focuses solely on examples of the "wrongful intent" variation of willfulness, wholly failing to recognize or address the "intentional, voluntary or deliberate, as opposed to accidental or involuntary" sense of the term's meaning. AR, Vol. 1, Doc. 39, p. 5 (acknowledging that "Petitioner does argue [in its motion for summary judgment], e.g., that Respondent 'willfully refused to grant Petitioner access to the records', but such contentions merely express that the refusal was *intentional* without alleging the anti-union motive or specific intent to deprive rights that is compelled by *FOP No. 40*." As noted above, *FOP No. 40* compels no such restrictive conclusion. Instead, it commends a broader construction of the term "willfully" reflective of the common understanding that the term encompasses a more expansive spectrum of meanings.

[3] Because an employee organization's right to represent bargaining unit members in grievances is specifically granted by statute, *see* K.S.A. 75-4327(a) and K.S.A. 75-4328(a), there is no reason here to apply the familiar balancing test, used for determining whether a given topic is a mandatorily-negotiable condition of employment. *See Kansas Bd.*

case-by-case basis whether a given topic of concern in employer-employee relations is a condition of employment for which mandatory negotiations shall be held as specified by K.S.A. 75-4327(b) and, second, by misapplication of the *Collyer* doctrine, concluding, erroneously, that "because petitioner effectively calls for the interpretation of the parties' MOA, a function beyond PERB's jurisdiction, this case [must be] dismissed." AR, Vol. 1, Doc. 39, p. 8. These issues will be examined in more detail below.

44. On Monday, September 1, 2014, FOP No. 37 filed a Petition for Review of Initial Order with the PERB. AR, Vol. 1, Doc. 40. Respondent filed its Response in Opposition to Petition for Review on September 17, 2014. AR, Vol. 1, Doc. 41. On September 30, 2014, Petitioner filed its Reply to Respondent's Response to Petition for Review. AR, Vol. 1, Doc. 44.

45. On October 30, 2015, the Board issued an order granting review of the Initial Order "to determine if the Respondent violated its duty under PEERA to bargain in good faith, by refusing to provide requested documents and information during the performance evaluation and termination proceedings related to Corporal Gregg." AR, Vol. 1, Doc. 46 at 4. The Board directed the parties to address:

> 1) The appropriateness in this case of applying a judicial balancing test to determine if the request for information unduly interferes with inherent managerial rights reserved to the employer, and if appropriate to apply any related analysis;
> 2) If the providing of documents and information such as was requested by the Petitioner is required of the Respondent, what limits if any may apply, particularly in regard to the privacy expectations of both members and non-members of the recognized employee organization representing the employee at issue.

Order Granting Review of Initial Order, AR, Vol. 1, Doc. 46 at pp. 4-5.

46. On January 14, 2016, FOP No. 37 and KUMC each submitted written legal arguments to the Board addressing the requested issues. AR, Vol. 1, Docs. 50, 51.

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of Regents v. Pittsburg State University Chapter of Kansas-National Educ. Association, 233 Kan. 801, 818-828, 667 P.2d 306 (1983).

47. The Board takes notice that thereafter, this matter was successively assigned to at least five different attorneys within the Department of Labor for the purposes of reviewing the case and advising the Board. Each in turn left the Department's employment or was otherwise reassigned from the matter and Kansas Department of Labor staff attorney Douglas A. Hager was assigned in early 2018 to review the matter for the purpose of advising the PERB regarding final agency action.

48. On March 20, 2018, the parties presented oral argument to Kansas Department of Labor staff attorney Douglas A. Hager. Hager later requested that the parties submit supplemental written legal argument addressing the issues and questions addressed at oral argument. The questions and issues addressed were delineated as follows:

> 1. What information requested by Petitioner has been produced?
> 2. What information requested by Petitioner has not been produced?
> 3. The Board's Order Granting Review of Initial Order states that the pleading requirements of applicable statutory provisions and regulations were met by Petitioner in its filing of Prohibited Practice complaints on forms provided by the board for that purpose. Is Respondent denied due process by the PERB not holding the Petitioner to a higher pleading standard?
> 4. Is it a denial of due process to not require Petitioners to specifically plead that Respondent's acts were the result of anti-union animus or of a specific intent to violate the employee's or the employee organization's rights? What is the appropriate definition of willfulness in the context of a prohibited practice complaint such as the instant one?
> 5. Were Petitioner's complaints sufficient to put the employer on notice that its actions were alleged to be willful as that term is used in the law?
> 6. The hearing officer's second stated grounds for dismissal was that because Petitioner effectively calls for the interpretation of the parties' MOA, a function beyond PERB's jurisdiction, this case must be dismissed. Was the hearing officer correct in stating that interpretation of the parties MOA is beyond PERB's jurisdiction?
> 7. The board in its discussion of the *Collyer* Doctrine sets out three conditions that must be met before the Labor Relations Board will defer to a contractually agreed mechanism for resolving disputes. Those three conditions are 1) a stable bargaining relationship; 2) intent to exhaust the MOA dispute resolution mechanism which will result in a final and binding arbitration; and, 3) the underlying dispute centers on interpretation of the MOA as opposed to a statutory issue. Did the parties' MOA for the time period here in question have a dispute mechanism culminating in final and binding arbitration?

8. Was the underlying dispute predominantly statutory or was it a dispute predominantly over the interpretation and application of the parties MOA?
9. Is it appropriate to apply the familiar balancing test to determine if the Union's request for information unduly interferes with the inherent managerial prerogative reserved by PEERA to the employer? Or, as Petitioner argues, does PEERA's K.S.A. 75-4328(a) requirement that "[a] public employer shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in . . . the settlement of grievances", make the balancing test inapplicable. Since the purpose of the balancing test is to determine whether a given topic is a mandatory topic of meet and confer, is it appropriate in the determination of this complaint?
10. If the employer is required to provide documents and information as requested by Petitioner, what limits, if any, apply particularly regarding the privacy expectations of both members and non-members of the recognized employee organization?
11. Can a category of disputes such as performance evaluations constitute a grievance under PEERA and yet be excluded from the parties' MOA grievance procedure? Stated in another fashion: Does the exclusion of performance evaluations from the parties' MOA contractual grievance mechanism preclude PERB from treating a dispute over performance evaluations as a grievance in a prohibited practice complaint?
12. K.S.A. 75-4322(b) defines supervisory employee and concludes by providing that an MOA "may provide for a definition of supervisory employee as an alternative" to the statutory definition. Can the parties' MOA in similar fashion provide for a definition of grievance as an alternative to the statutory definition? If not, is the MOA's exclusion of performance evaluations from its grievance procedure lawful under PEERA?
13. If the employee representative has a right to represent its members in the settlement of grievances, and this representation is accompanied by a right to request and receive information needed for the proper performance of that representation, what standard is appropriate to determine the scope of information properly requested? Is a usefulness standard, such as that set forth in *Procter & Gamble Mfg. Co. v. NLRB* appropriate? Is there extra-jurisdictional case law that provides persuasive guidance as to whether each of the categories of information requested in this case is information appropriately provided to an employee organization in carrying out its duty to represent bargaining unit members in a grievance?

Respondent's Supplemental Brief, April 15, 2019, pp. 2-4.

49. Petitioner filed its supplemental brief on March 15, 2019, and Respondent filed its supplemental brief on April 15, 2019. *See* Petitioner's Brief Pursuant to Presiding Officer's Order, filed March 15, 2019; Supplemental Brief of Respondent University of Kansas Medical Center

Pursuant to Presiding Officer's Order, filed April 15, 2019. On May 3, 2019, FOP No. 37 filed its reply brief. Petitioner's Reply Brief Pursuant to Presiding Officer's Order, filed May 3, 2019.

ISSUES IN DISPUTE

In the instant matter, after prohibited practice charges were filed and consolidated, the parties each respectively filed dispositive motions. Findings of Fact Nos. 37, 39. Implicit in their filings of said motions is the parties' respective admissions that the facts apparent from the pleadings and discovery allow this dispute to be decided as a question of law, i.e., there are no material facts in dispute. The Board concurs. A careful examination of the record of this matter confirms that there are no material facts in dispute.

In Respondent's Motion to Dismiss and/or for Judgment on the Pleadings, two issues are suggested for determination: 1) Respondent contends it is entitled to judgment as a matter of law because Petitioner failed to state a claim for which relief could be granted under PEERA by its failure to allege and its inability to prove that Respondent's refusal to provide requested information was committed willfully, that is, that its conduct was "motivated by an anti-union purpose", and, 2) Respondent argues that it is entitled to judgment as a matter of law because PERB is without authority to interpret the parties' MOA where the issue is solely one of interpretation or application of the agreement. AR, Vol. 1, Doc. 30, pp. 14, 19-20.

Under Petitioner's motion for summary judgment, the issue for resolution in this matter is summarized as follows: Does Respondent's refusal to provide information necessary for Petitioner's performance of its statutory obligation as exclusive employee representative constitute a prohibited practice pursuant to the provisions of K.S.A. 75-4333(b)? AR, Vol. 1, Doc. 32, pp. 2, 10-24. Before further examination of the parties' arguments advancing their respective

dispositive motions and the resulting determinations by the hearing officer, the Board will set forth a general overview of applicable substantive Kansas law regarding public sector employer-employee relations as it pertains to the issues here under consideration.

LEGAL CONCLUSIONS/DISCUSSION

A. General Overview of the Kansas PEERA

The Kansas Public Employer-Employee Relations Act, K.S.A. 75-4321 *et seq.*, provides public employees the right to form, join and participate in activities of employee organizations for meeting and conferring with public employers regarding grievances and conditions of employment, as well as the right to refrain from doing so. K.S.A. 75-4324. The Act defines the term "employee organization" to mean "any organization which includes employees of a public agency and which has as one of its primary purposes representing such employees in dealing with that public agency over conditions of employment and grievances." K.S.A. 75-4322(i). Grievances are defined by the Act to mean "a statement of dissatisfaction by a public employee, supervisory employee, employee organization or public employer concerning interpretation of a memorandum of agreement or traditional work practice." K.S.A. 75-4322(u).

For purposes of representing its members with regard to conditions of employment and grievances, the Act provides that:

> "Where an employee organization has been certified by the board as representing a majority of the employees in an appropriate unit, or recognized formally by the public employer pursuant to the provisions of this act, the appropriate employer shall meet and confer in good faith with such employee organization in the determination of conditions of employment of the public employees as provided in this act, and may enter into a memorandum of agreement with such recognized employee organization."

K.S.A. 75-4327(b). In turn, the Act defines "meet and confer in good faith" as "the process whereby the representative of a public agency and representatives of recognized employee

organizations have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals to endeavor to reach agreement on conditions of employment." K.S.A. 75-4322(m).

The duty to "meet and confer in good faith" extends to both representatives of a public agency or public employer and representatives of recognized employee organizations, *id.*, and it does not cease with the signing of a memorandum of agreement. Initial Order of the Presiding Officer, *Service Employees Union, Local 513 v. City of Hays, Kansas*, Case No. 75-CAE-8-1990, p. 18; *see also, United Steelworkers of America v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 581, S.Ct. 1347, 1352, 4 L.Ed.2d 1409 ("The grievance procedure, is in other words, a part of the continuous collective bargaining process.") Rather, the statutory meet and confer process is a continuing process that involves, among other things, the ongoing day-to-day resolution of problems and the protection of rights already secured by a memorandum of agreement through grievances, both informal and formal. *See, e.g.*, K.S.A. 75-4321(b) (stating that "it is the purpose of [the PEERA] to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment . . . . [and] to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions"); K.S.A. 75-4322(i)(defining "employee organization" to mean "any organization which includes employees of a public agency and which has as one of its primary purposes representing such employees in dealings with that public agency over terms and conditions of employment and grievances"); K.S.A. 75-4322(u)(defining "grievance" to mean "a statement of dissatisfaction by a public employee, supervisory employee, employee organization or public employer concerning interpretation of a memorandum of agreement or traditional work practice"); K.S.A. 75-

4322(b)(defining "supervisory employee", a class of employee that is excluded from the term "public employee", to mean any individual who normally performs different work form his subordinates, having authority, in the interest of the employer" to perform any of a list of twelve enumerated functions including "[the adjustment of employee] grievances", "or effectively to recommend a preponderance of such" [twelve enumerated supervisory functions], "if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires to use of independent judgment"); K.S.A. 75-4324 (providing that public employees "shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment"); K.S.A. 75-4327(a)(mandating that "[p]ublic employers shall recognize employee organizations for the purpose of representing their members in relations with public agencies as to grievances and conditions of employment"); K.S.A. 75-4328(a)(mandating that "[a] public employer shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances"); K.S.A. 75-4333(b)(1)(providing that it is a prohibited practice, constituting evidence of bad faith in meet and confer proceedings, for a public employer to "interfere, restrain or coerce public employees in the exercise of" the right to form, join or participate in the activities of employee organizations for the purpose of meeting and conferring with public employers with respect to grievances and conditions of employment); K.S.A. 75-4333(b)(6)(providing that it is a prohibited practice, constituting evidence of bad faith in meet and confer proceedings, for a public employer to "[d]eny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328" which provides that [a] public employer shall

extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances").

When provisions of the entire Act are read together, *in pari materia*, it is apparent that the duty to meet and confer in good faith does not end with the negotiation and signing of a memorandum of agreement, rather, as noted above, it encompasses the ongoing, day-to-day discussions regarding application and enforcement of the agreement through grievances including work practices and it extends also to impasse procedures. *See also,* Initial Order of the Presiding Officer, *Service Employees Union Local 513 v. City of Hays, Kansas*, Case No. 75-CAE-8-1980, p. 18 (citing *Conley v. Gibson*, 344 U.S. 41, 46 (1957)); Initial Order of the Presiding Officer, *Fraternal Order of Police, Lodge No. 42 v. City of Edwardsville, Kansas*, Case No. 75-CAE-5-2003, pp. 19-20 (duty to meet and confer extends beyond actual contract negotiations to include day-to-day contract interpretation and adjustments).

The term "conditions of employment" is defined by the Act to mean "salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures, but nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state." K.S.A. 75-4322(t).

With regard to the overall purpose of the Act, the Kansas Supreme Court has stated that:

> "The [PEERA], as provided in K.S.A. 75–4321(b), imposes upon public employers and recognized public employee organizations the obligation 'to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment.' "

Kansas Bd. of Regents v. Pittsburgh State Univ. Chap. of K-NEA, 233 Kan. 801, 805 (1983). The objective the Kansas legislature hoped to achieve by the meet and confer in good faith process can be equated to that sought by the Congress in adopting the National Labor Relations Act as described by the U.S. Supreme Court in H.K. Porter Co., 397 U.S. 99, 103 (1970), and cited with approval in PEERA administrative decision *City of Junction City, Kansas v. Junction City Police Officers Association*, Case No. 75-CAEO-2-1992, p. 30, n. 3 (July 31, 1992)("*Junction City*"):

> "The objective of this Act [NLRA] was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement."

The statutory declaration of policy and objectives of the Act, "to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment", K.S.A. 75-5431(b), i.e., to meet and confer in good faith, "is buttressed by section 75-4333(b)(5) which makes it a prohibited practice for a public employer to willfully 'refuse to meet and confer in good faith with representatives of recognized organizations as required in K.S.A. 75-4327.' " Raymond Goetz, The Kansas Public Employer-Employee Relations Law, 28 KAN. L. REV. 243, 268 (1980) (hereinafter "Goetz"). In his "most informative analysis of the [A]ct", *Kansas Bd. Of Regents v. Pittsburg State Univ. Chap. K-NEA*, 233 Kan. 801, 805 (1983), and of PERB's implementation of it, University of Kansas Professor Raymond Goetz remarked that the public employee rights assured by the Act would:

> "be meaningless without some provision for their enforcement. For this purpose, section 75-4333(b)(1) through (8) sets forth eight 'prohibited practices' for employers, the first five of which are patterned after the employer unfair labor practices in section 8(a)(1) through (5) of the LMRA. The Kansas Act differs from the LMRA in that the conduct specified constitutes a prohibited practice only if engaged in 'willfully'. The import of this qualification is far from clear".

Goetz, *supra*, at 263 (emphasis added). We now turn our attention to this qualification, that the conduct prohibited by the Act, constitutes a prohibited practice only if it is done "willfully".

What Constitutes a Prohibited Practice Engaged in "Willfully"

The hearing officer's Initial Order granted Respondent's motion to dismiss and/or for judgment on the pleadings, ruling in part, that each of Petitioner's prohibited practice complaints fail to state a claim upon which relief can be granted. AR, Vol. 1, Doc. 39, pp. 4, 8. This was so, according to the order, because Petitioner failed to plead allegations sufficient to put Respondent on notice that its action were alleged to have been undertaken "willfully" in the sense that they were motivated by "an anti-union animus or with a specific intent to violate an employee's, employees' or the recognized employee organization's rights." *Id.*, p. 4. This deficiency in Petitioner's pleadings, the Initial Order reasoned, failed "to provide [Respondent] adequate notice[4] of all essential elements of [Petitioner's] claim", necessitating dismissal. *Id.*, p. 5.

K.S.A. 75-4333(b) sets forth eight categories of acts which, if committed by the employer, constitute a prohibited practice and evidence of bad faith in meet and confer proceedings. Such conduct is considered a prohibited practice only if engaged in "willfully". *See* K.S.A. 75-4333(b) ("It shall be a prohibited practice for a public employer or its designated representative *willfully* to . . . ") (emphasis added). The Act does not define "willfully" and no Kansas appellate court decision has ever squarely addressed the issue under PEERA. *See, e.g., State, Dept. of Admin. v. Public Employee Relations Bd.,* 257 Kan. 275, 894 P.2d 777 (1995) (acknowledging that although Appellant raised issue "whether PERB must make an express finding that a prohibited practice

[4] It must be noted, however, that Respondent "does not claim that it was denied due process or lacked notice." Supplemental Brief of Respondent University of Kansas Medical Center Pursuant to Presiding Officer's Order, April 15, 2019, p. 12.

was 'willfully' committed," the Court expressed no opinion thereon because resolution of that issue was unnecessary under the specific facts of the case). A series of PERB administrative decisions, however, have provided guidance on this issue[5] and the statute's plain language is determinative.

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009). Thus, in applying the Act, this Board must interpret its provisions by ascertaining the intent of the legislature. "The first step in that analysis is simply to read the statutory language, giving common words their ordinary meanings. If that plain reading reveals

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[5] As authority for its argument, *see* Respondent's Supplemental Brief, April 15, 2019, pp. 11-13, Respondent relies on an Initial Order issued by PERB hearing officer Monty Bertelli in which "willfully" as used in K.S.A. 75-4333 was construed as "an act 'indicating a design, purpose, or intent on the part of a person to do wrong or cause an injury to another' ". Initial Order of the Presiding Officer, *Service Employees Union Local 513 v. City of Hays, Kansas*, Case No. 75-CAE-8-1990, April 14, 1991, p. 12 (citing to *Weinzirl v. Wells Group, Inc.*, 234 Kan. 1016 (1984). In his Initial Order, Presiding Officer Corkins adopted a position consistent with Respondent's argument, construing the term "willfully" to require an intent to do wrong or cause injury. AR, Vol. 1, Doc. 39, p. 4. It should be noted that the Board's view regarding the construction to be given the term "willfully" has evolved since the decision in *Service Employees Union Local 513* was issued. For example, in the Initial Order of the Presiding Officer in a case involving a prohibited practice charge and counter charge involving the Junction City Police Officers Association and the City of Junction City, Kansas, Presiding Officer Bertelli's Initial Order construes the term "willfully" with explicit reference to the common understanding that the word has more than one meaning and concluded that "the absence of an evil intent will not necessarily insulate a party from being found to have committed a prohibited practice." Initial Order of the Presiding Officer, *City of Junction City, Kansas v. Junction City Police Officers Association and Junction City Police Officers Association v. City of Junction City, Kansas*, Case Nos. 75-CAEO-2-1992 and 75-CAE-4-1992, July 31, 1992, pp. 27, 29. In that matter, Bertelli ruled that under PEERA willful conduct "does not require a deliberate intention to injure." *Id.*, p. 4. Rather, the intent in willful conduct under PEERA is "an intent to do an act, or an intent to not do an act, in disregard of the natural consequences, and under such circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to the rights of another." *Id.* In more recent years, PERB has construed "willfully" to mean "that the action complained of was intentional, voluntary or deliberate, as opposed to accidental or involuntary, or that it was undertaken with reckless indifference or disregard for the natural consequences thereof, or that it was done with wrongful intent." *See, e.g.*, Initial Order of the Presiding Officer, *Fraternal Order of Police Lodge No. 40 v. Unified Government of Wyandotte County/Kansas City, Kansas and Wyandotte County, Kansas Sheriff's Office*, Case No. 75-CAE-3-2006 and 75-CAE-10-2006, April 9, 2009, p. 64. The Board notes also that in a relatively recent case, the Kansas Court of Appeals has determined that when a cause of action depends on a showing that the defendant acted with malice, to withstand a motion to dismiss for failure to state a claim, the petition must sufficiently allege a specific intent to injure. *T.H. v. University of Kansas Hospital Authority*, 53 Kan.App.2d 332, Syl. ¶ 3, 388 P.3d 181 (2017). Here, there is no similar requirement of malice, or that the act be the result of willful and wanton misconduct, or other phrases of like import. Therefore, the Board concludes that the legislative intent that a prohibited practice be found only if committed "willfully" does not mandate the showing of a specific intent to injure.

what the legislature intended, we need not resort to legal treatises to create a meaning for the statute." *Douglas v. Ad Astra Information Systems, L.L.C.*, 296 Kan. 552, 560, 293 P.3d 723 (2013) (citation omitted). Further, "[i]t is presumed the legislature understood the meaning of the words it used and intended to use them . . . in their ordinary and common meaning." *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, Syl. ¶¶ 7–8, 834 P.2d 368 (1992); *see also, Midwest Crane & Rigging, LLC v. Kansas Corporation Commission*, Syl. ¶7, 306 Kan. 845, 397 P.3d 1205 (2017) (instructing that "[w]hen a statute does not define a term, the words in a statute are assumed to bear their ordinary, contemporary, common meaning"). "Dictionary definitions are good sources for the 'ordinary, contemporary, common" meanings of words.' " *Id.*, p. 851.

K.S.A. 75-4333(b) "parallels section 8(a)(1) of the federal [Labor Management Relations Act]", Goetz, p. 264, which doesn't contain the word "willfully", and which has been interpreted to not require specific intent. *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). It could be inferred that Kansas' legislature included the word "willfully" to make proof of a prohibited practice more difficult under Kansas law than under federal law. *See, e.g.*, Goetz, *supra* at p. 264 (noting that "it would seem proof of a prohibited practice is more difficult under Kansas law than under federal law" and that statutory rights afforded under PEERA were "diluted by the imposition of this nebulous requirement" of willfulness). However, doing so, i.e., inferring that Kansas' legislature included the word "willfully" to make proof of a prohibited practice more difficult under Kansas law than under federal law without first thoroughly examining the meaning or meanings of the term "willfully" would not be in accord with our Kansas Supreme Court's admonition to first read the statute, giving ordinary words their common meaning. *Bergstrom*, at 607.

Both the adjective "willful" and the adverb "willfully" are derivations of the root word "will". "Will" is defined to mean "the mental faculty by which one deliberately chooses or decides

upon a course of action; volition". AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (New College Edition 1976), p. 1465. The same source defines "willful" to mean "[s]aid or done in accordance with one's will; deliberate" and provides an alternative meaning, "inclined to impose one's will; unreasoningly obstinate". *Id.*, p. 1466. The United States Supreme Court observed that, "[i]n common usage the word 'willful' is considered synonymous with such words as 'voluntary,' 'deliberate,' and 'intentional.' " *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) (citing Roget's International Thesaurus § 622.7, p 479; § 653.9, p 501 (4th ed. 1977)). And, the Kansas Supreme Court has noted that "[w]illful and intentional are synonymous." *MGM, Inc. v. Liberty Mut. Ins. Co.*, 253 Kan. 198, 202–03, 855 P.2d 77 (1993). Giving the ordinary word "willfully" its common meaning suggests a legislative intent that the word "willfully" be construed to mean "deliberately" or "intentionally", but it could also be construed in accordance with the alternative common meaning, above, to reflect an act done in a manner that is "unreasoningly obstinate". Kansas appellate Courts have construed the term "willful" in accordance with this sense of the term. *See, e.g., Carter v. Koch Engineering*, 12 Kan.App.2d 74, 735 P.2d 247 (1987) ("[f]or a violation of instructions to be 'willful' under K.S.A. 44–501(d), it must include 'the element of intractableness, the headstrong disposition to act by the rule of contradiction' ") (citing to *Bersch v. Morris & Co.*, 106 Kan. 800, 804, 189 P. 934 (1920)).

BLACK'S LAW DICTIONARY defines the term "willful" as follows:

> "Proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary.
>
> An act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

> Willful is a word of many meanings, its construction often influenced by its context. . . .
>
> The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act. . . .
>
> A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative."

BLACK'S LAW DICTIONARY (5th Ed. 1979, p. 1434). Goetz also notes that "the term 'willful' is more commonly found in criminal statutes under which criminal intent is an essential element of particular crimes." Goetz, *supra*, p. 263. He continues, observing that "[u]nder [K.S.A.] 21-3201 proof of willful conduct is required to establish criminal intent and 'willful conduct' is defined as 'conduct that is purposeful and intentional and not accidental.'" *Id.*

Given that the common terms "willful" and "willfully" have more than one meaning, depending on the context in which used, an examination of some of those differing contexts may be instructive. Under the Kansas Wage Payment Act, ("KWPA"), K.S.A. 44-313 *et seq.*, for example, use of the term "willfully" denotes an element or condition which, if present, mandates imposition by the Kansas Department of Labor, of a statutory penalty for failure to pay wages.[6] *See* K.S.A. 33-315(b). Under the KWPA an employer is required to pay an employee earned

[6] Here we note that two of the hearing officers responsible in years past for issuing numerous Initial Orders under the PEERA were also accustomed to hearing disputes and issuing orders under the Kansas Wage Payment Act ("KWPA"). Each of these hearing officers, Monti Bertelli and Douglas Hager, were familiar with the KWPA's construction of willfulness and this familiarity may have influenced their early determinations under PEERA, in which "willfully" was construed in a manner consistent with the construction of willfulness by the Kansas Supreme Court under the KWPA. *See* Initial Order of the Presiding Officer [Bertelli], *Service Employees Union Local 513 v. City of Hays, Kansas*, Case No. 75-CAE-8-1990, April 14, 1991, p. 12 (citing to *Weinzirl v. Wells Group, Inc.*, 234 Kan. 1016 (1984)); Initial Order of the Presiding Officer [Hager], *Fraternal Order of Police, Lodge No. 42 v. City of Edwardsville, Kansas*, 75-CAE-5-2003, Sept. 29, 2006, p. 19 12 (citing to *Weinzirl v. Wells Group, Inc.*, 234 Kan. 1016 (1984)).

wages when due, that is on regular paydays designated in advance and "at least once during each calendar month". K.S.A. 44-314(a). Upon separation from employment, an employer must pay an employee's earned wages "not later than the next regular payday upon which he or she would have been paid if still employed." K.S.A. 44-315(a). In recognition of the important public policy of ensuring that Kansas workers receive compensation due them, the Kansas Legislature enacted a penalty provision to deter employers from failing to pay wages when due. This penalty provision mandates that where an employer "willfully" fails to pay earned wages when due, the employer "shall" be liable for payment of damages pursuant to a statutory formula that effectively equates the penalty to the amount of the unpaid wages.

In *A. O. Smith Corp. v. Kansas Dept. of Human Resources*, 36 Kan.App.2d 530, 144 P.3d 760 (2005) (hereinafter "*A. O. Smith*"), the Kansas Court of Appeals reaffirmed long-standing Kansas judicial determinations holding that the term "willful act", in the context of the KWPA means an act "indicating a design, purpose, or intent on the part of a person to do wrong or to cause an injury to another." Under the KWPA, courts have consistently construed the term "willfully" to require significant blameworthiness, proof of a wrongful state of mind or of an intent to injure, before the substantial mandatory monetary penalty is imposed. *See A. O. Smith, supra; Holder v. Kansas Steel Built, Inc.*, 224 Kan. 406 (1978); *Weinzirl v. The Wells Group, Inc.*, 234 Kan. 1016 (1984).

An identical formulation of willfulness has been used when imposing penalties under other Kansas laws. *See, e.g., Dold v. Sherow*, 220 Kan. 350, 354-355 (1976) (in action to recover damages for breach of express and implied warranties arising out of sale of cattle, if Plaintiff was entitled to recover actual damages and act of defendant was willful, that is, defendant's act was "one indicating a design, purpose, or intent on the part of a person to do wrong or to cause an

injury to another", Plaintiff can be awarded punitive damages to punish defendant and to deter others from like conduct); *Anderson v. White*, 210 Kan. 18, 19 (1972) (plaintiff in personal injury case was entitled to recover monetary damages only upon a showing that injury was result of willful or wanton misconduct by defendant, willful conduct defined to be "action indicating a design, purpose or intent on the part of a person to do wrong or to cause an injury to another."); *Burdick v. Southwestern Bell Telephone Co.*, 9 K.A.2d 182 (1984) (general exchange tariff filed by telephone company limits its liability, precluding plaintiff's recovery of damages for company's alleged negligence resulting in plaintiff's loss of business unless conduct of company was more than merely "willful" in the sense that it was "intentional"; for plaintiff to prevail, defendant's conduct must be shown to be "wanton and willful" in which context willful means "action indicating a design, purpose or intent on the part of a person to do or cause injury to another.").

However, in the view of the Board, and in light of the ordinary meanings of the common term "willfully", use of such a singular and restrictive formulation of willfulness is not appropriate under PEERA and is inconsistent with the imperative of giving ordinary words their common meaning. Indeed, it would seem odd that the appropriate measure of willfulness in the context of a labor relations dispute should somehow demand proof of a greater degree of culpability or blameworthiness than the "conduct-that-is-purposeful-and-intentional-and-not-accidental" formulation of willfulness that was required for imposition of criminal sanctions under the Kansas Criminal Code, K.S.A. 21-3201, contemporaneously at the time of PEERA's enactment. *See* Goetz, at 263.

In many determinations under PEERA, the consequences of and purposes to be served by a finding of willfulness is manifestly different than it is in the context of wage payment, personal injury, negligence, breach of contract or under the criminal code. As noted by BLACK'S LAW

DICTIONARY in the passages set out above, willful "is a word of many meanings, with its construction often influenced by its context". In the view of the Board, "willfully", as used in Kansas' public sector labor relations laws, should be neither administratively nor judicially construed to be identical in meaning to the term "willfully" where that term signifies a prerequisite or condition for imposing significant punitive damages. Instead, the relative differing purposes of the laws, the consequences of a finding that a prohibited practice was committed willfully, and the contexts in which the terms are used should serve as guideposts for their differentiation.

The purposes for which the Kansas Legislature enacted the Public Employer-Employee Relations Act are expressly articulated in the Act itself:

> "it is the purpose of this act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of the law. It is also the purpose of this act to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, or to refrain from joining, and be represented by such organizations in their employment relations and dealings with public agencies."

In a noteworthy early labor relations decision under PEERA, Kansas' Supreme Court observed that the Act is neither a strict "meet and confer" act, nor a "collective negotiations" act but a hybrid containing some characteristics of each. The Court concluded by stating that:

> "However it be designated, the important thing is that the Act imposes upon both employer and employee representatives the obligation to meet, and to confer and negotiate in good faith, with affirmative willingness to resolve grievances and disputes, and to promote the improvement of public employer-employee relations."

Kansas Bd. Of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 804-805 (1983). If, as the statutory text plainly states and the Kansas Supreme Court has affirmed, the purpose of the Act is to obligate both employers and employees to meet and confer in good faith with affirmative willingness to resolve grievances and to negotiate conditions of employment, the

necessity, when administering the law, of establishing that a party willfully, i.e., with anti-union animus or with intent to cause the other party injury, refused to meet and confer is starkly inconsistent with the plain, express purposes of the law and with the multiple ordinary meanings of the word "willfully" itself.

Further, the consequence of a finding of willfulness in a prohibited practice case is markedly different from the punishments or penalties that may accompany a finding of willfulness under other statutory regimes.[7] The consequence of a finding that a party willfully refused to meet and confer in good faith is typically an order that the parties resume bargaining, an order to post a copy of PERB's decision for review by the affected employees and perhaps some attempt to return the parties to their respective positions prior to the violation.

While the threshold of "willfulness" for granting punitive damages, or for stripping someone of a license to engage in their chosen profession, should be set high enough to reflect a significant element of blameworthiness, to ensure that the offense is commensurate with the punishment, when the consequence is that of being ordered to resume talks or restore the *status quo ante* there is less need to find substantially blameworthy intent or to find that actions were motivated, for example, by anti-union animus or by an intent to cause injury.

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[7] A finding of willfulness in a wage payment act claim is a mandatory monetary penalty that may effectively double the amount owed. *See, e.g., A. O. Smith, supra* (wages found due in amount of $370,798.43, penalty assessed in amount of $366,552.28, difference in amounts was result of one claimant's failure to file within statutory limitations period for penalty). A finding of willfulness in a breach of contract action may lead to punitive damages. *Dold v. Sherow*, 220 Kan. 350 (1976). A finding of willfulness in a nursing license administrative action may subject the license-holder to license suspension or even revocation. *See, e.g., Kansas State Board of Nursing v. Burkman*, 216 Kan. 187 (1975) (in review of proceeding to suspend nursing license, where registered nurse continued to practice nursing after negligently failing to apply for license renewal upon its expiration, courts reinstated license, finding that such negligence did not rise to generally accepted concept of willful conduct: "While willful has been said to be a word of many meanings depending on the context in which it is used, it generally connotes proceeding from a conscious motion of the will—an act as being designed or intentional as opposed to one accidental or involuntary."); *Golay v. Kansas State Board of Nursing*, 15 K.A.2d 648 (1991) (in administrative licensing disciplinary proceeding, Board has authority, in furtherance of its duty to protect public by regulating nursing licensing, to initiate investigations on its own motions; finding of willful violation of Kansas Nurse Practice Act sufficient grounds for denial, revocation or suspension of license).

Moreover, a plain reading of the law reveals that a prerequisite to sustaining a prohibited practice charge is finding and concluding that the complained-of action was committed willfully. K.S.A. 75-4333. Absent willfulness, and thus absent the conclusion that a prohibited practice was committed, PERB is without authority to order the parties to resume negotiations. In the context of the facts of this case, construing "willfully" to require proof by a preponderance of substantial competent evidence of an anti-union animus or of an intent to violate the employee's, employees' or employee organization's rights is inconsistent not only with the purposes motivating PEERA's enactment, but it is also inconsistent with the ordinary meaning of the common word, "willfully", chosen by the legislature as a prerequisite to providing a means for the Board to enforce the Act.

Given that the legislature is presumed to know the meaning of the common words it chooses for use in statutes, one should conclude that the legislature was aware of the many variations and gradations of meaning for the term "willfully". Thus, in ascertaining legislative intent for the requirement that a prohibited practice will not be found unless it was committed "willfully", the Board concludes that "willfully" is to be construed in accordance with the ordinary meanings which the term is commonly understood to represent, i.e., that the action complained of was intentional, voluntary or deliberate, as opposed to accidental or involuntary, that it was undertaken in an unreasoningly obstinate manner or with reckless indifference or disregard for the natural consequences thereof, or that it was done with wrongful intent. Proof of anti-union animus or of a specific intent to violate an employee's, employees' or the recognized employee organization's rights are merely two examples of ways to establish willfulness in the "wrongful intent" sense of meaning for this element of a prohibited practice charge. *See* Initial Order of the Presiding Officer, *Fraternal Order of Police Lodge No. 40 v. Unified Government of Wyandotte County/Kansas City, Kansas and Wyandotte County Sheriff's Department*, 75-CAE-3-2006 and

75-CAE-10-2006, April 9, 2009, p. 64. The Board concludes that the Initial Order erred by applying the "wrongful intent" sense as the exclusive meaning of "willfully".

The Board rejects the Initial Order's erroneous conclusion[8] on this point, finding instead that Respondent received adequate notice that its actions were alleged to have been "willfully" committed in accordance with the ordinary meanings with which that term is ordinarily understood. *See* AR, Vol. 1, Doc. 1, p. 1 (alleging that Employer committed prohibited practices within the meaning of K.S.A. 75-4333(b)(1), (2), (3), (5) and (6); K.S.A. 75-4333(b) provides that it shall be a prohibited practice, and shall constitute evidence of bad faith in meet and confer proceedings, for the public employer or its designated representative to "willfully" commit any of the eight categories of actions denoted as employer prohibited practices.) *See also*, Findings of Fact Numbers 14, 15, 16, 17, 18, 21, 22, 23, 25, 32, 33, 34, 42 and footnote nos. 2 and 5.

Having examined PEERA, generally and the statutory imperative that prohibited practices be committed "willfully", and having rejected the Initial Order's erroneous determination to dismiss Petitioner's prohibited practice complaints for failure to state a claim upon which relief could be granted by interpreting "willfully" in a manner far more restrictive than the ordinary meanings of that term, we will now examine the alternative basis upon which the hearing officer's Initial Order dismissed Petitioner's consolidated prohibited practice complaint before addressing

[8]The hearing officer's conclusion that Petitioner failed to state a claim for relief was erroneous because under Kansas law, "[t]he plaintiff is 'entitled to have the petition interpreted liberally in his favor with respect to any indefiniteness or uncertainty in its allegations and to have all inferences reasonably to be drawn therefrom resolved in his favor.'" *City of Andover v. Southwestern Bell Telephone, L.P.*, 37 K.A.2d 358, 153 P.3d 561 (2007) (citing *Horton v. Atchison, T. & S.F. Rly. Co.*, 161 Kan. 403, 406, 168 P.2d 928 (1946)). Further, for purposes of a motion to dismiss for failure to state a claim, the tribunal is required to draw any reasonable inferences from the facts pled and determine whether the facts and inferences state a claim on the plaintiff's theory or on any other possible theory the tribunal can divine. *See, e.g., Marty v. Driscoll*, 297 Kan. 524, 302 P.3d 375 (2013). Petitioner's prohibited practice complaint clearly provided notice to Respondent that its action were alleged to have been committed "willfully" in accordance with the ordinary meaning of the term and, further, Respondent expressly denied that it lacked such notice. Respondent's Supplemental Brief, April 15, 2019, p. 12; Footnote No. 4.

Petitioner's arguments for summary judgment regarding the several individual prohibited practice provisions of the Act alleged to have been violated.

DO PETITIONER'S COMPLAINTS REQUIRE PERB TO INTERPRET THE PARTIES' MOA AND, IF SO, DOES PERB HAVE JURISDICTION TO DO SO?

The hearing officer's Initial Order indicates that in addition to basing its decision to dismiss on Petitioner's alleged failure to put Respondent on notice that its actions were alleged to have been committed willfully, i.e., that they were motivated by an anti-union animus or were committed with the specific intent to violate the employee's, employees' or employee organization's rights, the hearing officer concluded that Petitioner's complaints would be dismissed under the additional rationale that they "effectively call[ed] for the interpretation of the parties' MOA, a function beyond PERB's jurisdiction". AR, Vol. 1, Doc. 39, p. 8. The hearing officer's conclusion regarding this alternative basis for his dismissal determination represents another misapprehension concerning the requirements of applicable Kansas law.

It is widely recognized and understood that many disputes between employee organizations and employers can be characterized in terms that will invoke MOA dispute resolution procedures, such as a contractual grievance mechanism, and can also be described in a manner that would make them subject to statutory procedures, such as PEERA's prohibited practice provisions. At the federal level, the National Labor Relations Board has developed what is known as the *Collyer-Spielberg* doctrines to provide a reasoned approach for the Board in determining when and whether to defer an unfair labor practice charge to a contractual grievance mechanism, both in pre-arbitral circumstances and in post-arbitral situations.[9] In years past, the Public Employee Relations Board

[9] For an in-depth discussion of these doctrines, and their adoption under the PEERA, *see* Initial Order of the Presiding Officer, *International Association of Firefighters, Local 3309 v. City of Junction City, Kansas (Fire Department)*, 75-CAE-4-1994, July 29, 1994, pp. 35-57.

has adopted essentially the same policy, that is, to defer under certain circumstances the consideration of a prohibited practice charge in favor of the resolution of the underlying dispute through a contractual dispute mechanism, such as a grievance procedure. *See* Initial Order of the Presiding Officer, *International Association of Firefighters, Local 3309 v. City of Junction City, Kansas (Fire Department)*, 75-CAE-4-1994, July 29, 1994, pp. 35-59; Initial Order of the Presiding Officer, *Fraternal Order of Police Lodge No. 40 v. Unified Government of Wyandotte County/Kansas City, Kansas and Wyandotte County Sheriff's Department*, 75-CAE-3-2006 and 75-CAE-10-2006, April 9, 2009, pp. 8-21.

In general terms, the PERB has determined that it will exercise its discretion to defer consideration of a prohibited practice charge in favor of a contractual grievance mechanism where three conditions are met. These conditions are: 1) a stable bargaining relationship between the parties; 2) intent by the respondent to the prohibited practice complaint to exhaust the memorandum of agreement grievance procedure culminating in final and binding arbitration; and 3) the underlying dispute centers on the interpretation or application of the memorandum of agreement. *See* Initial Order of the Presiding Officer, *International Association of Firefighters, Local 3309 v. City of Junction City, Kansas (Fire Department)*, 75-CAE-4-1994, July 29, 1994, pp. 56-57.

To the extent that this matter represents a situation subject to consideration by the Board of its discretionary deferral of a prohibited practice charge in favor of a contractual grievance mechanism, deferral is inappropriate for two reasons. First, the parties to this charge do not have an MOA grievance mechanism culminating in final, binding arbitration. AR, Vol. 1, Doc. 32, Exh. A, Att. 3 (providing that Article 40 grievance procedure, which ends in advisory arbitration, not binding arbitration, does not apply to appeals of performance evaluations). *See also*, Finding

of Fact No. 10 (not only does the performance evaluation grievance or appeal process not end in a binding decision by an impartial neutral, the ultimate decision maker, in most cases, does not review the actual documents that form the basis of an unsatisfactory performance evaluation but conducts an interview with the evaluating supervisor).

And, second, the underlying dispute between these parties does not center on interpretation or application of the parties' MOA. That is to say, interpretation of the parties' MOA in this dispute is subordinate to the resolution of statutory concerns. The fundamental question raised by Petitioner's prohibited practice charge is whether PEERA requires public employers to provide their recognized employee organizations with information in furtherance of the employee organization's duty to represent its members[10] in the context of a grievance, regardless whether their grievance procedure specifically provides for it where, as in this matter, such right has not been clearly and unmistakably waived. Further, even if the hearing officer had been correct that interpretation of the parties' MOA is a function beyond the jurisdiction of the PERB, and he was not, *see, e.g.*, Initial Order of the Presiding Officer, *International Association of Firefighters, Local 3309 v. City of Junction City, Kansas (Fire Department)*, 75-CAE-4-1994, July 29, 1994, Syl. ¶ 8

[10] The Board's conclusion on this point, i.e., that it will not defer a prohibited practice charge raising the issue of whether an employer subject to PEERA must provide information to a recognized employee organization necessary to discharge its duty of fair representation, is consistent with the policy adopted by the National Labor Relations Board under the National Labor Relations Act. Under the NLRA, an alleged refusal by an employer to furnish relevant information needed by union for use in collective bargaining or grievance processing is a type of case that is not subject to *Collyer* deferment absent a clear and unmistakable waiver of union's statutory right to receive information. *See, e.g., Daimler-Chrysler Corp. v. N.L.R.B.*, 288 F.3d 434, 169 L.R.R.M. (BNA) 3217, 351 U.S.App.D.C. 181 (2002) (noting that NLRB has consistently held since at least 1984 that such disputes will not be deferred to arbitration; this policy decision is justified in part because an employer's obligation to provide such information is derived from statutory duties independent of the labor contract and in part because such information is essential to the union if it is to effectively perform its statutory duty as the exclusive bargaining agent for unit employees). In the instant matter, the MOA's contractual grievance mechanism does not contain a clear and unmistakable waiver of the union's right to information in the context of a grievance. *See* Finding of Fact No. 8. To gain a better understanding of what constitutes a "clear and unmistakable waiver" in the context of this agency's administration of Kansas' public sector labor relations laws, *see* Initial Order of the Presiding Officer, *Bruce Lindskog, Representative, Oakley Education Association v. Unified School District 274, Oakley, Kansas*, Case No. 72-CAE-6-1992, Dec. 11, 1992, pp. 28-32 (indicating that "[w]aiver will not be inferred from a contract's silence on the subject, from a generally worded management prerogatives clause or from a 'zipper clause.' ").

(noting that where a dispute "may be arguably contractual in nature, deferral is inappropriate where interpretation of the contract becomes subordinate to the resolution of the statutory question"); Order of the Public Employee Relations Board, *AFSCME Council 64 v. Kansas Department of Transportation, District I, Local 1417*, 75-CAE-6-1982, October 18, 1982, pp. 4-6 (concluding that the Board does have jurisdiction to resolve prohibited practice charge requiring interpretation of parties' MOA[11]), the core of this dispute centers on application of the PEERA and the issue here in dispute is not solely one of interpretation or application of the parties' MOA. The Board thus rejects the hearing officer's second grounds for dismissing Petitioner's complaints as well. Kansas law requires an employer to provide information necessary for the performance of a recognized employee organization's statutory duty to represent its members in meet and confer regarding terms and conditions of employment and with regard to day-to-day adjustments and grievances. Because the obligation to provide such information is derived from statutory duties independent of the labor contract and in part because such information is essential to the union to perform its statutory duty as the exclusive bargaining representative for unit employees, such disputes will not be deferred to a contractual dispute resolution mechanism absent a clear and unmistakable waiver of the union's right to such information. In the instant matter, while Respondent repeatedly alleged that the parties' MOA grievance procedure "did not contemplate" the exchange of documents, that is, the MOA failed to address the question, the Union's right to such information is provided by statute, *see* K.S.A. 75-4327(a) ("[p]ublic employers shall recognize employee organizations for the purpose of representing their members . . . as to grievances and conditions of employment");

[11] To the extent that any previous decisions of the Board, or its hearing officers, have determined otherwise, such decisions are limited to their facts. *See, e.g.*, Initial Order of the Substitute Presiding Officer, *Fraternal Order of Police Lodge No. 4 v. City of Kansas City, Kansas Police Department*, Case No. 75-CAE-24-1993, p. 19 (determining that issue presented, whether the exclusive waiver under the terms of the bargaining agreement had been exercised by the union, was an issue arising under the parties' contract and interpretation and construction of the terms of the contract itself was not a function of the Board and not within its jurisdiction).

K.S.A. 75-4333(b)(5)("[i]t shall be a prohibited practice for a public employer . . . willfully to . . . [r]efuse to meet and confer in good faith . . . as required in K.S.A. 75-4327; and, K.S.A. 75-4322(m) (defining "meet and confer in good faith" as "the process whereby the representative of a public agency and representatives of recognized employee organizations have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals to endeavor to reach agreement on conditions of employment"), and nowhere in the parties' MOA is there a clear and unmistakable waiver of the Union's statutory right to information necessary to carry out its duties as exclusive representative of employees.

PETITIONER'S MOTION FOR SUMMARY JUDGMENT
Prohibited Practice in Contravention of K.S.A. 75-4333(b)(5)

Having rejected as erroneous the Initial Order's decision to grant Respondent's dispositive motions, the Board now directs its focus on Petitioner's motion for summary judgment. AR, Vol. 1, Doc. 32. Kansas Supreme Court opinions inform this tribunal's judgment regarding said motion. The burden of proof on a party seeking summary judgment is a strict one. *Kerns By and Through Kerns v. G.A.C., Inc.*, 255 Kan. 264, 875 P.2d 949 (1994). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011); *Warner v. Stover*, 283 Kan. 453, 455–56, 153 P.3d 1245 (2007). This tribunal must resolve all facts and inferences that may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. *City of Wichita v. Denton*, 296 Kan. 244, 255, 294 P.3d 207 (2013). The party opposing summary judgment must come forward with facts to support its claim, that is, with evidence to establish a dispute as to a material fact. *Apodaca v. Willmore*,

306 Kan. 103, 105, 392 P.3d 529 (2017). In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. *Osterhaus, supra,* at 768.

In this matter, the material facts are not in dispute. AR, Vol. 1, Docs. 30, 32. The parties simply disagree as to how the law applies to those facts.

In its June 24, 2013 prohibited practice charge, Petitioner alleged that KUMC's actions were a violation of K.S.A. 75-4333(b)(5), which makes it a prohibited practice and evidence of bad faith in meet and confer proceedings for an employer willfully to "[r]efuse to meet and confer in good faith with representatives of recognized employee organizations as required in K.S.A. 75-4327". In its June 18, 2014 Motion for Summary Judgment, Petitioner urges that "Respondent has an ongoing duty to meet and confer on grievances, regardless of whether the parties are currently engaged in the negotiation of a collective bargaining agreement". AR, Vol. 1, Doc. 32, p. 11. This duty applies both to mandatory subjects of bargaining as well as to subjects that are significantly related to mandatory subjects of bargaining. *Id.*, p. 12. Corporal Gregg's appeals of his unsatisfactory performance evaluations and of his termination are grievances under PEERA, regardless whether and how they are covered by the MOA. *Id.*, p. 13. Further, Respondent's duty to meet and confer in good faith includes the duty to provide the employees' recognized bargaining representative with information necessary to effectively represent unit members. *Id.*, p. 16. Petitioner elaborated as follows:

> "In *Kansas Dept. of Social and Rehab. Services v. PERB*, 249 Kan. 163, 815 P.2d 66 (1991), the Kansas Supreme Court found that an employer was obligated to provide the bargaining representative with names and addresses of all the employees within the bargaining unit. The Court upheld a decision by PERB that the employer has a duty to provide the Union with information necessary to fulfill its function as a bargaining representative. *Id.*, at 168-70.
>
> This is consistent with the position courts and the NLRB have taken with respect to employers' duty to collective bargaining representatives under the National Labor Relations Act ('NLRA'). *National Labor Relations Board v. ACME*

> *Industrial Co.*, 385 U.S. 432, 435-436 (1967). Due to the similar purpose and statutory language of PEERA regarding the duty to 'meet and confer in good faith' and the duty to 'bargain in good faith' under the NLRA, federal decisions under the NLRA provide guidance and are instructive regarding the merits of a prohibited practice charge. *Fraternal Order of Police, Lodge No. 42, supra* at 16-17 and n1.
>
> The duty to 'bargain in good faith' under the NLRA includes the duty to provide the Union with information the Union needs for the proper performance of its duties. *ACME*, 385 U.S. at 435-436. In *ACME*, the United States Supreme Court affirmed that an employer violated its duty to bargain in good faith when it refused to provide information requested by the Union that was relevant to a potential grievance. *Id.*; *see also, Salt River Valley Users' Ass'n. v. NLRB*, 769 F.2d 639, 640-41 (9th Cir. 1985)(holding failure of either party to give the requesting party information necessary to enable it to intelligently evaluate a potential grievance may constitute an unfair labor practice)."

AR, Vol. 1, Doc. 32, p. 17. Petitioner notes that in addition to being a violation of K.S.A. 75-4333(b)(5), Respondent's failure to provide Petitioner the information in its possession that is needed by Petitioner to fully and fairly represent Corporal Gregg constitutes interference with the rights granted to an employee organization under K.S.A. 75-4324 and is a prohibited practice pursuant to K.S.A. 75-4333(b)(1). *Id.*, p. 17.

In its arguments in support of its own Motion to Dismiss and in response to Petitioner's Motion for Summary Judgment, Respondent has alleged that it has no duty to provide Petitioner with records because the parties' MOA does not contemplate discovery. AR, Vol. 1, Doc. 30, p. 16; AR, Vol. 1, Doc. 37, pp. 25-26. Petitioner responds that because its right to documents and information needed to meet its duty of representation arises under the PEERA, not the MOA, its failure to negotiate for such rights in the parties' MOA is not fatal to its right to said information. AR, Vol. 1, Doc. 32, pp. 18-19. "Respondent's argument that Petitioner failed to contract for a right that is granted it by state law is unduly restrictive." *Id.* "Petitioner's right to the information it has requested is statutorily secured by PEERA." *Id.*, p. 19. Petitioner draws a persuasive analogy

when it asserts that "Respondent's argument is akin to saying residential landlord/tenant leases are not controlled by the established state property law." *Id.*, p. 18.

The Board concurs. Having thoroughly considered the record and arguments of the parties with regard to Petitioner's Motion for Summary Judgment, including the supplemental legal arguments filed per request of staff attorney Douglas A. Hager, the Board grants Petitioner's motion. Petitioner is entitled to judgment as a matter of law with regard to its contention that as a recognized employee organization, Respondent has the obligation to provide it with information to enable it to perform its statutory obligation to represent members in meet and confer, both with regard to terms and conditions of employment and regarding grievances.

By its consistent refusal to provide the information sought by Petitioner, Respondent "willfully" committed the prohibited practice of "refus[ing] to meet and confer in good faith . . . as required in K.S.A. 75-4327 [which applies both to contract negotiations and grievances]" in both the "intentional, voluntary or deliberate, as opposed to accidental or involuntary" sense of the term and in the sense that Respondent's refusal to provide the requested information "was undertaken in an unreasoningly obstinate manner" or "with reckless indifference or disregard for the natural consequences" of that action, which such natural consequences are that Respondent's actions thwarted the parties in their satisfaction of the statutory purpose of the PEERA, i.e., that the parties "meet and confer and negotiate in good faith with affirmative willingness to resolve grievances and disputes, and to promote the improvement of employer-employee relations." *Kansas Board of Regents v. Pittsburg State University Chapter of KNEA*, 233 Kan. 801, 805, 677 P.2d 306 (1983).

While its document requests at first blush may appear extensive, each item of information requested was relevant and appropriate under the circumstances and applicable law to enable

Petitioner to exercise its obligation to represent all bargaining unit members, whether members of the employee organization or not. *See* AR, Vol. 1, Doc. 32, pp. 20-23 (specifically explaining the relevance of each category of information requested). In reaching these conclusions, the Board is guided by not only the plain language of the statute, but also by reference to labor boards' and the Courts' interpretations of like provisions of other statutory labor relations regimes.

For example, in *DaimlerChrysler Corporation v. NLRB*, 288 F.2d 434, 169 LLRM (BNA) 3217, 361 U.S.App.D.C. 181 (2002), the employer petitioned for review of an order of the NLRB declining to defer unfair labor practice charges to arbitration and finding that the employer committed unfair labor practices under the National Labor Relations Act's § 8(a)(5), the federal law's unfair labor practice counterpart to PEERA's K.S.A. 75-4333(b)(5) prohibited practice of refusal to meet and confer in good faith, and the Board filed a cross-application for enforcement.

In its decision to deny employer's petition for review and grant the Board's cross-application for enforcement, the Court of Appeals held, in pertinent part, that the Board properly refused to defer the unfair labor practice to the grievance and arbitration procedure contained in the parties collective bargaining agreement and that the employer violated the NLRA by failing to furnish requested information regarding employee grievances. *DaimlerChrysler*, 288 F.3d at 434.

An alleged refusal by an employer to furnish relevant information needed by a union for use in collective bargaining or grievance processing is a type of case that is not subject to *Collyer* deferment absent a clear and unmistakable waiver of the union's statutory right to receive information. *Id.*, at 439. With regard to information requests concerning employee grievances, the Court held, "the duty to bargain includes the obligation to provide information that a union needs in order to perform its duties in grievance processing and collective bargaining negotiations (*citing National Labor Relations Board v. ACME Industrial Co.*, 385 U.S. 432, 437, 87 S.Ct. 565,

568, 17 L.Ed.2d 495 (1967)." Further, information related to the wages, benefits, hours, and working conditions of unit employees is presumptively relevant and "other information must also be furnished if the union can show that it is relevant to the performance of [the union's] duties". *Id.*, 385 U.S. at 443. *See also, National Labor Relations Board v. Davol, Inc.,* 597 F.2d 782 (1st Cir. 1979) (holding that NLRB properly refused to defer to arbitration and properly ordered employer to disclose information requested by union and in so ordering, Board did not determine meaning of contract but acted only upon probability that desired information was relevant, thus making it possible for union to evaluate potential grievance before it incurred expense of arbitration); *Union Builders, Inc. v. National Labor Relations Board*, 68 F.3d 520 (1st Cir. 1995) (holding that duty to bargain unquestionably extends beyond period of contract negotiations and applies to labor management relations during term of collective bargaining agreement and that NLRB may determine that employer has duty to provide information to union if it finds even a probability that information is relevant and that it will be of use to union in carrying out its statutory duties); *Brewers and Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 361, 77 L.R.R.M. (BNA) 2705, 367 U.S.App.D.C. 14 (2005) (concluding that employer violates duty to bargain in good faith, which includes obligation to provide union with information relevant to collective bargaining process in certain circumstances, not only by refusing to provide such relevant information, but also by not providing it in timely manner).

Likewise in the instant matter, it is the finding and conclusion of the Board that as a matter of law under the Kansas PEERA, Respondent was under an obligation, grounded in K.S.A. 75-4327(a) and related provisions, to provide relevant information in its possession needed by the Petitioner to investigate a potential grievance and to fulfill its statutory obligation as exclusive employee organization to represent its members with regard not only to meeting and conferring

over terms and conditions of employment but also with regard to grievances, both formal and informal. The Board notes that when information of a sensitive nature is the subject of request by the Union, the parties may address such concerns through various measures, such as through *in-camera* inspections, protective orders, and, in the appropriate case, by redacting or even refusal. *See, e.g., Detroit Edison Co. v. National Labor Relations Board*, 99 S.Ct. 1123 (1979) (holding that employer did not commit an unfair labor practice by refusing to disclose, without a written consent from individual employees, the employee psychological aptitude testing scores linked with individual employee names). It is the finding and conclusion of the Public Employee Relations Board that Respondent's refusal to provide the relevant information herein requested by Petitioner, *see* Finding of Fact Nos. 15, 17, 21, 22, 23, 24, 25, 33 and 34, constituted a willful violation of K.S.A. 75-4333(b)(5).

Prohibited Practices in Contravention of K.S.A. 75-4333(b)(1) and (b)(6)

K.S.A. 75-4333(b)(1) provides that it is a "prohibited practice for a public employer or its designated representative willfully to interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324". K.S.A. 75-4324 provides that "[p]ublic employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment." Under PEERA, an "interference", or "(b)(1)", charge can be classified as either derivative or independent. While he did not attribute to them the same classifications by name, the noted commentator Raymond Goetz acknowledges the existence of derivative violations of K.S.A. 75-4333(b)(1) as well through

violations of any of the other seven prohibited employer practices. An "interference" charge, according to Goetz,

> "really is a 'catchall' because of its broad general language. By its terms, it includes almost anything an employer might do that would tend to interfere with the statutory right to [representation]. The remaining seven employer prohibited practices enumerated in section 75-4333(b)(2) through (8) constitute specific applications of the sweeping prohibition against interference in section 75-54333(b)(1). Any conduct which would violate (2) through (8) would also violate (1)."

Goetz, The Kansas Public Employer-Employee Relations Law, 28 KAN. L. REV. 243, at 264.

PERB has found that a violation of K.S.A. 75-4333(b)(1) exists whenever any of the other prohibited practice violations have been established. *See, e.g., Fraternal Order of Police, Lodge No. 47 v. Leavenworth County Sheriff's Department*, Case No. 75-CAE-3-1999 (Dec. 22, 1999)(finding that violations of (b)(3) and (b)(4) also constituted violation of (b)(1)); *Fort Hays State University Chapter of the American Association of University Professors v. Fort Hays State University*, Case No. 75-CAE-12-2001 (Mar. 10, 2004)(concluding that violations of (b)(5) and (b)(6) also constituted violations of (b)(1)).

Under PEERA, some acts infringe upon its "interference" prohibition only and are not viewed as being incidental to the violation of some other subdivision of that section. *See Service Employees Union Local 513 v. City of Hays, Kansas*, 75-CAE-8-1990 (April 14, 1991) (disciplining a union steward for his efforts to represent a bargaining unit member in a grievance was determined to violate (b)(1), but it was noted that this action could also have been prosecuted as a (b)(3) violation for the chilling effect it could likely have on union membership); *Service Employees Union v. Board of Ellis County Comm'rs*, 75-CAE-1-1973 (May 3, 1973)(in PERB's very first prohibited practice adjudication, the Board found that suspension of workers three days

in advance of representation election was in reprisal for organizing activities in violation of (b)(1) and employer's willful actions also violated (b)(3)).

The Board concludes that Respondent's willful violation of K.S.A. 75-4333(b)(5), detailed above, was also a derivative violation of PEERA's "interference" provision[12], K.S.A. 75-4333(b)(1). Likewise by its violation of K.S.A. 75-4333(b)(5), that is, by its intentional refusal to provide Petitioner the information necessary and relevant to its representation of a member in his grievances stemming from unsatisfactory performance evaluations and the resulting termination, Respondent willfully violated its statutory obligation to extend to the certified employee organization the right to represent employees of the unit in meet and confer proceedings and in the settlement of grievances, in contravention of K.S.A. 75-4333(b)(6).

Prohibited Practices in Contravention of K.S.A. 75-4333(b)(2) and (b)(3)

Recall that over the course of its two prohibited practice charges, Petitioner alleged violations of K.S.A. 75-4333(b)(1), (b)(2), (b)(3), (b)(5) and (b)(6). *See* Findings of Fact No. 25 (alleging, in first charge, violations of K.S.A. 75-4333(b)(1), (b)(3), (b)(5) and (b)(6)); Finding of Fact No. 34 (alleging, in second charge, violations of K.S.A. 75-4333(b)(1), (b)(2), (b)(3), (b)(5) and (b)(6)). Subsections (b)(1), (b)(5) and (b)(6) have been addressed. The remaining provisions alleged to have been violated provide it shall be a prohibited practice for an employer willfully to:

> "(2) Dominate, interfere or assist in the formation, existence, or administration of any employee organization;

[12] For an extensive discussion of the analysis whether an action is an independent, as opposed to derivative, violation of PEERA's "interference" provision, *see* Initial Order of the Presiding Officer, *Fraternal Order of Police Lodge No. 40 v. Unified Government of Wyandotte County/Kansas City, Kansas*, 75-CAE-3-2006 and 75-CAE-10-2006, pp. 65-82 (April 9, 2009). In the instant matter, Respondent's violation of K.S.A. 75-4333(b)(5) also constitutes a derivative violation of K.S.A. 75-4333(b)(1) and the Board notes that while Respondent's actions likely also constitute an independent violation of K.S.A. 75-4333(b)(1), the Board declines to lengthen this Order with the further analysis necessary to make that determination.

(3) Encourage or discourage membership in any employee organization, committee, association or representation plan by discrimination in hiring, tenure or other conditions of employment, or by blacklisting"

K.S.A. 75-4333(b). In view that Petitioner does not make specific argument regarding Respondent's alleged violations of these provisions, the Board declines to lengthen this Order by addressing them. Petitioner's allegations regarding K.S.A. 75-4333(b)(2) and (b)(3) are dismissed.

IT IS THEREFORE ADJUDGED, that the Kansas Public Employee Relations Board is not required to defer action on a prohibited practice charge, but has the discretion to so defer under the circumstances set forth in detail above.

IT IS FURTHER ADJUDGED, that the Kansas Public Employee Relations Board will not defer a prohibited practice charge raising the issue whether an employer subject to the Act must provide information necessary to discharge an employee organization's obligation of exclusive representation absent a clear and unmistakable waiver of such right.

IT IS THEREFORE ORDERED, that the Hearing Officer's Initial Order granting Respondent's Motion to Dismiss and/or For Judgment on the Pleadings is herein set aside for all the reasons previously set out.

IT IS FURTHER ORDERED, that Petitioner's Motion for Summary Judgment is granted; Respondent University of Kansas Medical Center, for the reasons set out above, did willfully interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324; and, did willfully refuse to meet and confer in good faith with the Petitioner Fraternal Order of Police Lodge No. 37 as required by K.S.A. 75-4327; and, did willfully deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328, thereby committing prohibited practices as set forth in K.S.A. 75-4333(b)(1), (b)(5) and (b)(6).

IT IS FURTHER ORDERED, that Respondent provide to Petitioner the information and documents that were requested with regard to Corporal Gregg's grievances and fulfill its statutory obligation to meet and confer in good faith with Petitioner with reference to said unsatisfactory performance evaluation grievances and with regard to Corporal Gregg's termination.

IT IS FURTHER ORDERED, that Respondent shall cease and desist its refusal to meet and confer in good faith in the resolution of unit member grievances by refusing to provide relevant information and documents requested by the recognized employee organization and needed for the fair representation of its members, as described in this Order.

IT IS FURTHER ORDERED, that for a period of not less than thirty (30) days, the University of Kansas Medical Center shall post a copy of this order in a conspicuous location at each duty station where members of the employee unit represented by Fraternal Order of Police Lodge No. 37 are assigned to work.

DATED, this 7th day of November, 2019.

Joni J. Franklin, PERB Board Member

Michael Ryan, PERB Board Member

Jonathan Gilbert, PERB Board Member

Abstained

Rick Wiley, PERB Board Member

, PERB Board Member

NOTICE OF RIGHT TO JUDICIAL REVIEW

The foregoing Order constitutes final agency action of the Public Employee Relations Board. This Order is subject to review in District Court in accordance with the Kansas Judicial Review Act, K.S.A. 77-601 *et seq*.

Unless a motion for reconsideration is filed pursuant to K.S.A. 77-529, a petition for judicial review must be filed in the appropriate district court within 30 days after the final order has been served upon the parties. If a petition for reconsideration is filed, the right to judicial review shall recommence upon service of a final order disposing of the motion for reconsideration.

Pursuant to K.S.A. 77-527(j), K.S.A. 77-613(e) and K.S.A. 77-615(a), any party seeking judicial review must serve a copy of its petition for judicial review upon the Public Employee Relations Board by serving its designated agent at the following address:

Public Employee Relations Board
c/o Justin Whitten, Chief Counsel
Kansas Department of Labor
401 SW Topeka Blvd.
Topeka, Kansas 66603-3182

CERTIFICATE OF SERVICE

I, the undersigned, in accordance with K.S.A. 77-531, do hereby certify that I served a true and correct copy of the above and foregoing Order upon the following by depositing the same in the United State Mail, post prepaid, to:

Matthew R. Huntsman, Attorney at Law
BUKATY AUBREY & HUNTSMAN, CHARTERED
10975 Benson Drive, Suite 370
Overland Park, Kansas 66210
Attorney for Petitioner, Fraternal Order of Police Lodge No. 37

And

Eric J. Aufdengarten, Associate General Counsel and
Special Assistant Attorney General
Room 245 Strong Hall
1450 Jayhawk Blvd.
Lawrence, Kansas 66045
Attorney for Respondent, University of Kansas Medical Center

And

Cheryl Whelan, Director
Kansas Office of Administrative Hearings
1020 S. Kansas Avenue
Topeka, Kansas 66612

On this 7th day of November, 2019.

Douglas A. Hager, No. 16688
Counsel, Kansas Public Employee Relations Board